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91-539
Case No.

UNITED STATES OF AMERICA
SUPREME COURT
October, 1991 Term

DONALD LORD,

Petitioner,

v.

FARM CREDIT BANK OF SAINT PAUL,
f/k/a the Federal Land Bank of St. Paul
and RICHARD HOBL

Respondents.

Petition for Writ Certiorari from the
Supreme Court for the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Wisconsin Supreme Court erred in overturning the decision of the Wisconsin Court of Appeals and disregarding the provisions of 11 U.S.C. sec. 506(d) as applied to the Wisconsin statute relating to redemption of real property from foreclosure where a person discharged in bankruptcy seeks to redeem his property from a judgment of foreclosure for the value of the lien as determined either in the Bankruptcy Court for the Western District of Wisconsin or by the high bid price sought to be confirmed by the Plaintiff in the foreclosure action.

Rule 14.1(a)

PARTIES IN THE PROCEEDING SOUGHT TO BE REVIEWED

1. Donald Lord, petitioner. Represented in proceeding in Wisconsin Supreme Court by Byrne & Goyke, S.C., George B. Goyke and Terrence J. Byrne on brief, and orally argued by George B. Goyke. Mailing address P.O. Box 1566, Wausau, Wisconsin, 54402-1566. Styled Defendant-respondent in Wisconsin Supreme Court proceeding.

2. Richard Hobl. Represented in proceeding in Wisconsin Supreme Court by Nicolay, Jensen, Scott, Gamoke & Grunewald, S.C., Raymond H. Scott and William A. Grunewald on brief, and orally argued by both Raymond H. Scott and William A. Grunewald. Mailing address P.O. Box 328, Medford, Wisconsin, 54451. Styled Appellant -Petitioner in Wisconsin Supreme Court proceeding.

3. Farm Credit Bank of Saint Paul.[1] Represented in proceeding in Wisconsin Supreme Court by Whyte & Hirschboeck, S.C., Donald B. Rintelman and Kenneth R. Nowakowski on brief. No oral argument. Mailing address 111 East Wisconsin Avenue, Suite 2100, Milwaukee, Wisconsin, 53202-4894. Styled amicus curiae in Wisconsin Supreme Court proceeding. Also Plaintiff in original case.

4. Wisconsin Bankers Association. Represented in proceeding in Wisconsin Supreme Court by Boardman, Suhr, Curry &

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1 In compliance with Rule 29.1, Petitioner is unaware of any parent companies or wholly-owned subsidiaries of Farm Credit Services of Saint Paul.

Field, John E. Knight and James E. Bartzen on brief. No oral argument. Mailing address First Wisconsin Plaza, Suite 410, 1 South Pinckney Street, P.O. Box 927, Madison, Wisconsin, 53701. Styled amicus curiae in Wisconsin Supreme Court proceeding.

Rule 14.1(b)

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1. Wisconsin Supreme Court decision: Hobl v. Lord, ___ Wis.2d ___, 470 N.W.2d 265 (1991).

2. Wisconsin Court of Appeals decision: Hobl v. Lord, 157 Wis.2d 13, 458 N.W.2d 536 (Ct.App.1990).

3. Circuit Court for Taylor County, Wisconsin decision: Farm Credit Bank v. Lord, Case No. 87-CV-113.

4. United States Bankruptcy Court for the Western District of Wisconsin decision: Lord v. Farm Credit Bank (In re Lord), Case No. EU7-89-00332; Adversary No. 89-0062-7.

Rule 14.1(d)

JURISDICTIONAL GROUNDS

i. Date of entry of judgment: June 5, 1991

ii. Date of orders respecting rehearing:N/A
Date and terms of order granting time within which to file petition for writ of certiori: N/A

iii. Cross-petition information: N/A

iv. Jurisdictional grant 28 U.S.C. sec. 1257 (appeal from the decision of a highest court of a State where the validity of a statute of a State is drawn in question on the ground of its being repugnant to the laws of the United States).

Rule 14.1(e)

STATUTES CALLED IN QUESTION

Article I, Section 8, Clause 4, United States Constitution

Article VI, Clause 2, United States Constitution

11 U.S.C. sec. 506(a)

11 U.S.C. Sec. 506(d)

11 U.S.C. sec. 524

11 U.S.C. sec. 727

Sec. 846.13, Wis. Stats.

Rule 14.1(f)

STATEMENT OF THE CASE

Donald Lord and his brothers and sisters were born and raised on the family farm in Taylor County, Wisconsin. The farm had been in the Lord family since the 1920's. Don Lord has at all times relevant to this proceeding continued to reside on the family farm. His mother, Ida Lord, lived on the farm until her death on January 14, 1989. She had retained a second mortgage against the farm arising from her transfer of the title to her son, Don.

In 1987, Farm Credit Bank of Saint Paul commenced an action against the Defendant-Respondents, Donald Lord and his mother, wherein it sought foreclosure and sale of the Lord's farmstead. The Trial Court entered a Judgment of Foreclosure on December 23, 1987.

Faced with the death of his mother and the spectre of the loss of his property, Donald Lord filed a voluntary petition under chapter 7 of the Bankruptcy Code on February 14, 1989, pursuant to relief granted by the

Bankruptcy Court specifically for this purpose. The sheriff sold the property at public sale on April 28, 1989. Though Farm Credit Bank had a judgment in excess of $125,000, it permitted the appellant's $50,000 bid to prevail.

Lord received his bankruptcy discharge on June 2, 1989, which relieved him from any personal liability to Farm Credit Bank of Saint Paul, the land itself remaining solely subject to the FCB lien. The Plaintiff's motion for confirmation of the sheriff's sale and the Defendant-Respondent's motion for redemption of the property were heard June 14, 1989. Don Lord tendered $50,000 to the Clerk of Courts prior to the hearing on confirmation. The money was a loan from his brothers and sisters who now live in Madison, Milwaukee, and other urban areas in the State of Wisconsin. The Trial Judge granted Lord's motion for redemption, thereby rendering moot the plaintiff's motion for confirmation of sale. At the conclusion of the hearing for

redemption and/or confirmation, Richard Hobl, the Appellant-Petitioner and the high bidder at the sheriff's sale, received back his deposit made at the time of sale. 2

Richard Hobl appealed the Trial Court's decision to the Court of Appeals, who agreed with the Trial Court that a discharged debtor may pay the value of the creditor's lien to redeem the mortgaged property. The Appeals Court held that "judgment" as used in sec. 846.13, Stats., means that part of the mortgage foreclosure judgment which survives bankruptcy proceedings. The Court stated, "Requiring Lord to redeem by paying the full foreclosure judgment would effectively nullify the bankruptcy court's actions. In order to give the bankruptcy court's stripdown the effect intended, we hold that "judgment" as used in sec. 846.13 means the amount of the judgment that survives bankruptcy proceedings.

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2 Hobl refused return of his deposit in an apparent attempt to preserve some right in the real estate or the foreclosure action.

The Wisconsin Supreme Court reversed the Court of Appeals. Relying primarily upon In re Dewsnup, 908 F.2d 588 (10th Cir. 1990), a case in which incidentally this Court has granted certiori, the Wisconsin Court determined that "[u]nder sec. 846.13, Stats., a mortgagor may only redeem the mortgaged property for the full amount of the foreclosure judgment plus interest, costs, and taxes." Hobl v. Lord, 470 N.W.2d 265, 272 (1991). In its analysis, the Court acknowledged the existence of the "strip-down" in several other jurisdictions and chose to rely instead upon the minority view, ignoring even the decision of the Seventh Circuit Court of Appeals in whose jurisdiction it sits. It went so far as to cite In re Lindsay, 823 F.2d 189 (7th Cir. 1987) and ignore the language it cited. Lindsay states: ". . . the only thing that remained to do in the bankruptcy proceeding was to discharge the debtors and let the creditors foreclose their stripped-down

liens, subject to whatever rights of redemption the debtors might have, under state law, in the foreclosure proceedings. Hobl v. Lord, 470 N.W.2d at 270 (bold emphasis in original, underline emphasis added). The Wisconsin court emphasized the state law clause but ignored the plain language that the foreclosure would only be of stripped-down liens. It thereby held the Wisconsin state law superior to the federal law though a conflict existed. The superiority of the federal rights should not be so denigrated.

Rule 14.1(g).

The jurisdictional references required by Rule 14.1(h) are contained in the appendix hereto.

AMPLIFICATION OF THE REASONS FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Wisconsin upheld the precise language of the Wisconsin statute, despite the Bankruptcy Court's order valuing the secured claim of Farm Credit Bank of Saint Paul and of Mr. Lord's discharge in bankruptcy. The Wisconsin Supreme Court has held the laws of the State superior to the laws of the United States, an outcome prohibited by the Constitution of the United States. By this decision, a state court of last resort has decided a federal question (i.e. the effect of the Bankruptcy Court's lien stripping and discharge of Donald Lord on his right to redeem his family farm) in a way that conflicts with the decision of the United States Court of Appeals for the Third, Seventh, Ninth and Eleventh Circuits, [1] and

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1 In re Gaglia, 889 F.2d 1304 (3rd Cir. 1989)); In re Lindsey, 823 F.2d 189 (7th Cir. 1987); In re Houghland, 886 F.2d 1182 (9th Cir. 1989)[chapter 13] and In re Folendore, 862 F.2d 1537 (11th Cir. 1989).

with the plain meaning of 11 U.S.C. sec. 506. The Wisconsin Supreme Court's decision should be overturned.

In a related issue, In re Dewsnup, 908 F.2d 588 (10th Cir. 1990), cert. granted ___ U.S. ___, 111 S.Ct. 949, 112 L.Ed.2d 1038 (1991), this court has agreed to consider the issue of applicability of 11 U.S.C. sec. 506(d) to strip a lien in a chapter 7 bankruptcy case. This petition seeks determination of the next logical question to be answered: What to do with a stripped-down lien in a chapter 7 case once the discharge is granted? The only logical answer can be that the stripped-down lien is to be redeemed in accordance with state redemption law, and the unsecured claim resulting from the bifurcation of the claim is discharged.

It is almost axiomatic that a debtor in a chapter 11, 12 and 13 Bankruptcy case may strip down a lien and amortize the secured claim of the creditor over a period of time.

2> The purpose of many bankruptcy reorganizations is to limit a creditor's secured claim to the fair market value of the collateral securing it and to make payments upon this secured claim over time. The remainder of the claim is unsecured and paid in accordance with the Debtor's Plan or discharged. In this fashion, Congress has allowed an overburdened farmer, business, or wage-earner to work out of a financially troubled situation and reorganize his or her operation, providing them with a fresh start.

Congress' approach to the write-down of

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2 A frequent argument is raised that the ability to strip down liens is limited in these chapters. See, e.g., 11 U.S.C. sec. 1111 (a little-used provision where a creditor may elect to forego an unsecured claim in a chapter 11 case and retain the full value of its lien against the collateral); 11 U.S.C. sec. 1322(b)(2) (prohibiting the impairment of a claim secured only by a residence). However, these arguments rely upon specialized situations, and Congress did not choose to expand these small exceptions. Congress did, however, mandate the application of 11 U.S.C. sec. 506(d), as well as all of chapters 1, 3 and 5, in conjunction with cases under each of chapters 7, 9, 11, 12 and 13.

the Creditor's debt is evidenced in its 1978 revisions to the Bankruptcy Code, Title 11 U.S.C., which were effective October 1, 1979. In those revisions, Congress added language permiting a debtor to void a lien to the extent it secures a claim which is not an "allowed secured claim" or, in other words, to avoid a lien when the value of the collateral is less than the amount of the claim. One commentator stated:

> One of the more significant changes from former law in new Title 11 USCS, is the treatment of secured creditors and secured claims. Unlike former law, 11 USCS sec. 506 distinguishes between secured and unsecured claims, rather than between secured and unsecured creditors. The distinction becomes important in the handling of creditors with a lien on property that is worth less than the amount of their claim, that is, those creditors who are undersecured. Former law was ambiguous and vague, especially under former Chapter 13, on whether an undersecured creditor was to be treated as a secured creditor or as a partially secured and partially unsecured creditor. By addressing this problem in terms of claims, the new law makes clear

> that an undersecured creditor is to be treated as having a secured claim to the extent of the value of the collateral, and an unsecured claim for the balance of his claim against the debtor.

Bkr-L Ed sec. 21:50, vol. 3, p.95, citing H. Rept No. 95-595, p. 180.

11 U.S.C. sec. 506 states, in relevant part:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 533 of this title, is a secured claim to the extent of the value of the creditor's interest in the estate's interest in such property, or to the extent of the amount of the setoff, as the case may be, and an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and the proposed disposition of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> . . .
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> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--
>
> (1) such claim was disallowed

only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. sec. 506(a), (d).

The effect of bifurcating a creditor's claim into secured and unsecured portions has been discussed by this Court in U.S. v. Ron Pair Enterprises, Inc., __ U.S. __, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

> Subsection (a) of sec. 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured. 3/
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> 3/ Thus, a $100,000 claim secured by a lien on property of a value of $60,000.00 is considered to be a secured claim to the extent of $60,000.00 and an unsecured claim for $40,000.00. See 3 Collier on Bankruptcy par. 506.04, p. 506-15 (15th Ed. 1988)("section 506(a) requires a bifurcation of a 'partially secured' or 'undersecured' claim into separate and independent secured claim and unsecured claim components.")

Id., 109 S.Ct. at 1029.

This substantial change in the Bankruptcy Code presented debtors with a new right to bifurcate claims into secured and unsecured portions (sec. 506(a)) and then to void or "strip down" a lien to the extent it is secured (its value) and discharge the remainder of the claim in a bankruptcy proceeding (sec. 506(d)). As referenced above, virtually every chapter 11,3> 12 4> and 13 5> case similarly strip down a creditor's lien to the fair market value of the collateral in order to reorganize the debtor's affairs by paying the creditor the value of its secured claim over a period of time. This "write-down" enables a debtor utilizing these chapters to reorganize its affairs to the benefit of the debtor without detriment to the secured creditor, who

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3 See 11 U.S.C. sec. 1129(a)(7)(A)(ii).

4 See 11 U.S.C. sec. 1225(a)(5)(B).

5 See 11 U.S.C. sec. 1322(b)(2); see also In re Houghland, 886 F.2d 1182 (9th Cir. 1989).

generally receives the value of its collateral plus a market rate of interest. Sec. 506(d) likewise applies in chapter 7 cases despite the debtor's inability to force the creditor to assist them in reorganizing their affairs through acceptance of payment over time. 11 U.S.C. sec. 103(a).

Section 506(d) lien avoidance works as follows:

> Debtors often request the determination of a creditor's secured status under sec. 506(a) of the Bankruptcy Code in order to avoid liens on their real property, under section 506(d), to the extent they are not allowed secured claims. One effect of permitting lien avoidance is the expansion of the scope of the debtor's discharge, under Section 524(a), to include in rem actions against real estate.
>
> A hypothetical is useful to show the interaction of sections 506(d) and 524(a). Suppose the debtor owns a house encumbered by a first mortgage of $100,000 and a second mortgage of $80,000. Having encountered financial difficulty, the debtor defaults on both mortgages. Unable to redeem his house or satisfy other debts, the debtor decides to file for relief under chapter 7. Under Section 506(a), the court determines that

> the fair market value of the house is $130,000. Therefore, the first mortgagee is fully secured and the second mortgagee has a $30,000 secured claim and a $50,000 unsecured claim. If the pro rata distribution to the second mortgagee is less than $50,000, then the discharge prohibits the mortgagee from instituting a deficiency action against the debtor. In addition, the mortgagee cannot institute a post-discharge in rem action against the debtor's house if lien avoidance is permitted under Section 506(d). . .

Ballato, In Rem Lien Avoidance in Chapter 7: Lenders Beware, 7 Bankruptcy Developments Journal, pp. 155-156.

The Seventh Circuit Court of Appeals confronted a situation where a chapter 7 debtor wanted to force an unwilling creditor to amortize its secured claim over a period of time, just as it would have in a reorganization case. 6> In re Lindsey, 823

6 A chapter 7 debtor may enter into a reaffirmation agreement with a creditor pursuant to 11 U.S.C. sec. 524(c). However, a reaffirmation agreement requires the consent of the creditor to the terms of the agreement. Unlike chapters 11, 12 and 13, chapter 7 contains no provisions to force an unwilling creditor to receive its secured claim over a period of time.

F.2d 189 (7th Cir. 1987). The Lindseys owned a hog farm worth $233,000 but owed creditors holding mortgages against the farm in excess of $550,000. The Lindseys asked that the liens in excess of the fair market value be voided, and the Bankruptcy Court granted their request. This gave the debtors an opportunity to satisfy the allowed secured claims for the amount that the court determined to be a fair valuation. Lindsey v. Federal Land Bank of St. Louis (In re Lindsey), 64 B.R. 19 (Bankr. C.D.Ill. 1986). The Debtors, who wished to force the creditors to accept installment payments to retain their property, appealed the Bankruptcy Court's decision through the district court and on to the Seventh Circuit Court of Appeals, which stated:

> The combined effect of [sections 506(a) and 506(d)] is to "strip down" a lien to the value of the security. . . The Lindseys asked the bankruptcy judge to "strip down" the mortgages to the current

> market value of the real estate. The banks argued, unavailingly, that 11 U.S.C. sec. 506 does not apply to liens on real estate; they have wisely abandoned the argument. See 3 Collier on Bankruptcy par. 506.07, at p. 506-71 (15th ed., King ed., 1987).

In re Lindsey, 823 F.2d 189 (7th Cir. 1987).

The Seventh Circuit then held that though the liens were stripped down, the Debtor could not compel an unwilling creditor to enter into a reaffirmation agreement. It stated ". . . the only thing that remained to do in the bankruptcy proceeding [following the strip-down of the creditor's lien] was to discharge the debtors and let the creditors foreclose their stripped-down liens, subject to whatever rights of redemption the debtors might have, under state law, in the foreclosure proceedings." Lindsey, 823 F.2d at _______.

The Lindsey court recognized that the secured claim was all that could be

foreclosed--the remainder of the debt was discharged in the bankruptcy proceeding. This determination was also advanced by a Tennesse Court who concurred that lien-stripping left a claim that could be paid to relieve real estate from the lien.

> By permitting the debtors to pay cash for that liquidation value, these creditors are actually saving the expense of foreclosure. Both the Code provisions of sec. 506 and equity are well served by allowing a cash payment to the secured creditors. And, this Court is merely putting the parties in the position they would be under applicable state law on redemption (cites omitted). Tennessee Code Annotated 66-6-101, et seq. permits a debtor to redeem mortgaged property for two years after foreclosure unless such redemption is waived. These debtors waived their "equity or right of redemption" in the deed of trust (Trial Ex. 1); however, that does not preclude satisfaction prior to foreclosure by payment of the full secured debt. . . This deed of trust refers to default causing "the entire indebtedness hereby secured" to become due. (Trial Ex. 1, par. 4) This Court is merely finding that the total debt secured is the present market value less the first mortgage balance and that is consistent with the deed of trust language. These creditors may not boost their secured debt beyond what is an allowable secured claim in bankruptcy.

In re Zobenica, 109 B.R. 814, 821 (Bankr. W.D.Tenn. 1990).

Lindsey and Zobenica set forth the majority view, 7> Wisconsin bankruptcy courts have expressed their conclusion that the majority view is determinative. See, Geiger v. Geiger, 12 B.R. 410 (Bankr. E.D.Wis. 1981)[mortgage survives after bankruptcy because no party in interest requested a 506(d) determination which would have limited it--see also analysis of Geiger in In re Tanner, 14 B.R. 933, 937 (Bankr. W.D.Pa. 1981)]; In re Lampert, 61 B.R. 785 (Bankr. W.D.Wis. 1986)[lien against cottage worth

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7 In addition to the circuit court decisions, the minority view is reflected in In re Garnett, 88 B.R. 123 (Bankr.W.D.Ky. 1989) aff'd 99 B.R. 757 (W.D.Ky. 1989); In re Zlogar, 101 B.R. 1 (Bankr.N.D.Ill. 1985); In re O'Leary, 75 B.R. 881 (Bankr.D.Or. 1987); In re Worrell, 67 B.R. 16 (Bankr.C.D.Ill. 1986); In re Cleveringa, 52 B.R. 56 (Bankr.N.D.Iowa 1985); In re Lyons, 46 B.R. 604 (Bankr. N.D.Ill. 1985); In re Hunter, 101 B.R. 294 (Bankr.S.D.Ala. 1989); In re Gibbs, 44 B.R. 475 (Bankr.D.Minn. 1984); In re Brace, 33 B.R. 91 (Bankr.S.D.Ohio 1983); In re Tanner, 14 B.R. 933 (Bankr.W.D.Pa. 1981); In re Zobenica, 109 B.R. 814 (Bankr.W.D.Tenn. 1990), among others.

nothing so avoided in its entirety].A minority of courts perceive various reasons to alter the plain language of 11 U.S.C. sec. 506(d) to arrive at a different result.8>

In this case, the Wisconsin Supreme Court altogether disregarded the bankruptcy law, and the United States statutes affecting a debtor's rights after a strip-down. Unfamiliar with bankruptcy law, the Court did not recognize that Mr. Lord's creditor possessed a secured claim and an unsecured claim, that the discharge granted under 11 U.S.C. sec. 727 eliminated the unsecured claim, and that all that remained was the secured lien against the real estate. The Court instead it theorized that the debtor would not be held subject to a deficiency

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8 The minority view is best set forth in In re Dewsnup, 87 B.R. 676 (Bankr.D.Utah 1988); In re Maitland, 61 B.R. 130 (Bankr.E.D.Va. 1986); In re Cordes, 37 B.R. 582 (Bankr.C.D.Cal. 1984); In re Mahaner, 34 B.R. 308 (Bankr.W.D.N.Y. 1983); and In re Shrum, 98 B.R. 995 (Bankr.W.D.Okla. 1989). But see In re Moses, 110 B.R. 962 (Bankr.N.D.Okla. 1990), another Oklahoma case which declines to follow Shrum.

not without effect. Hobl v. Lord 470 N.W.2d at p. 269. However, the debtor would not have been subject to a deficiency judgment had the adversary proceeding not taken place--the discharge takes care of that aspect. The Court's theory therefore eviscerates the effect of the bankruptcy court order in the 506(d) proceeding.

As stated in Lindsay, once a lien stripping has occurred, "all that remains is the foreclosure of the stripped-down lien, subject to whatever rights of redemption the debtor may have under state law. . ." Lindsay at p. ____. The lien-stripping must have an effect other than what would be accomplished through the natural course of the bankruptcy discharge. It must affect the lien for other purpsoes as well, such as redemption from a State Court judgment.

The Wisconsin Court seems to believe that if the majority is followed, the debtor

in such circumstance would receive a windfall. The Court emphasized the language in Folendore, 862 F.2d at 1538, ". . . Section 506 does not give a debtor its property back [free of encumbrances] as some sort of windfall." Hobl v. Lord at p. 271. The Court further cited Gaglia, 889 F.2d at p. 1310, for the proposition that Lord could not obtain the property without suffering the possibility of the first mortgage-holder's foreclosure. "Even after lien avoidance [of the second mortgage to the extent it is not secured], the Gaglias [the debtors] will not own the [mortgaged] property unencumbered. They will still be subject to First Federal's [first] mortgage and the SBA's [the second mortgagee's] claim to the extent it is secured." Id., citing Gaglia. The Wisconsin Court obviously misunderstood the Gaglia holding--the secured claim of Farm Credit Services in this case still exists, subject to redemption under state law. But Donald

Lord and his family have emotional ties to the farm, and Mr. Lord is the rare debtor with the financing available from his family to redeem his property after a bankruptcy. There was certainly no windfall sought--Mr. Lord simply wants to prevent a windfall to the creditor and pay only what the farm is worth.

The Wisconsin court went on to attempt to distinguish Lindsay, Folendore, Zobenica, and others on the basis of State law permitting only redemption from the judgment. It primarily relied upon Dewsnup to reach the distinction, a case which this Court will soon consider. It further emphasized that sec. 506 does not effect a redemption (see Hobl v. Lord at pp. 270, 271, 272 and 273) while ignoring that in each of the cases, a redemption was permitted under applicable state law in the amout of the stripped down lien. The Wisconsin Court's decision required redemption for the full amount of

the judgment, plus attorney's fees, costs and interest. It has thereby prioritized the Wisconsin lien redemption statute over the federal bankruptcy law.

The United States Constitution preserves the supremacy of the laws of the United States over those of the states.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Article VI, clause 2, United States Constitution.

The supremacy clause invalidates all state laws that conflict or interfere with an act of Congress. See, Rose v. Arkansas State Police, 479 U.S. 1, 107 S.Ct. 334, 93 L.Ed.2d 183 (1986). The State Court's excuse for denial of a federal right is not a valid excuse if it is inconsistent with a federal

law; the supremacy clause forbids state courts from disassociating themselves from federal law because it disagrees with its contents or refuses to recognize the superior authority of its source. Howlett By and Through Howlett v. Rose, ___ U.S. ___, 110 S.Ct. 2430, 110 L.Ed.2d 332 (198__).

Bankruptcy laws are a constitutional grant of power to Congress. Article I, Sec. 8, clause 4, United States Constitution. The Bankruptcy Code, Title 11 U.S.C. sec. 101 et seq., is part of the supreme law of the land and preempts State law. See, e.g., Mission Independent School District v. State of Texas, 116 F.2d 175, 44 Am.Bankr.Rep.N.S. 293 (5th Cir. 1940), cert. denied, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103.

> Owing to the supremacy clause, federal bankruptcy law preempts state law; as one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the Constitution. CF. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589, 601-02, 55 S.Ct. 854, 863, 869, 79 L.Ed.

> 1593 (1935). Whether Congress has actually exercised its bankruptcy power in a particular area is, of course, a matter of statutory construction.

In re Goerg, 844 F.2d 1562 (11th Cir. 1988).

The Wisconsin Court interpreted the applicability of lien stripping under 11 U.S.C. sec. 506(d). It determined that the Bankruptcy Court's action had no effect upon the redemption of real estate, and that Don Lord had to redeem the property for in excess of $129,000 when Richard Hobl could purchase it for $50,000. In invalidating the lien stripping by the Bankruptcy Court and requiring Don Lord to bear the burden of the judgment as entered, it nullified his bankruptcy rights and in effect denied his "fresh start" in requiring that he pay more to keep the family farm than anyone else, more than the farm was worth by all estimates. The United States' bankruptcy laws long ago replaced debtor's prisons as a

way to cope with persons unable to pay their debts. Congress enacted these bankruptcy laws to permit a debtor to receive a fresh start free from creditor's harassment. The Bankruptcy Code provides honest debtors a discharge from their debts, which is codified in 11 U.S.C. sec. 524.

> (a) A discharge in a case under this title--
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of any action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of a kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community

> claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(c)(1) of this title, or that would be so excepted, determined in accordance with section 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commencement on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on any such community claim is waived.

11 U.S.C. sec. 524(a).

The Committee on the Judiciary made the following observations as to this discharge:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect, recover, or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been

> expanded over a comparable provision in the Bankruptcy Act sec. 14f [former section 32(f) of this title] to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives or employers, harassment, threats of repossession, and the like. The change is consonant with the new policy forbidding binding reaffirmation agreements under proposed 11 U.S.C. 524(b), and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that. . .

Committee on the Judiciary, Senate Report No. 95-989.

Congress thus unequivacably expressed its intention that a discharged debt may not be collected in any manner.

It is undisputed that the value of the mortgaged farm fell far short from the amount owed Farm Credit Bank. The parties stipulated that $50,000 plus delinquent real estate taxes represented the fair market value of the farm. In its holding, the

Wisconsin court denied Don Lord of the benefit of the bankruptcy discharge and a fresh start by requiring that the entire amount of the judgment be paid in order to redeem the property--including the unsecured discharged portion, and including the avoided lien.

Donald Lord and his family obviously have a strong emotional and sentimental attachment to the farm where they were raised. The Court should not deny Lord the effect of his discharge by ordering that he pay the discharged amount in excess of the property's value in order to redeem his property.

Dated this 30th day of August, 1991.

BYRNE & GOYKE, S.C.

By George B. Goyke

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Attorney for Donald Lord
P.O. Box 1566
Wausau, WI 54402-1566
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APPENDIX

A

RICHARD HOBL, Appellant-Petitioner,

Farm Credit Bank of Saint Paul,
formerly known as The Federal Land
Bank of Stain Paul, Plaintiff,

v.

Donald LORD and Ida Lord,
Defendants-Respondents.

No. 89-1759.

Supreme Court of Wisconsin.

Argued April 24, 1991.

Decided June 5, 1991.

Mortgagor of foreclosed farm land sought to redeem land sold at sheriff's sale for "stripped down" value of mortgaged property established in Chapter 7 bankruptcy proceeding when mortgagee moved to confirm sheriff's sale. The Circuit Court, Taylor County, Gary L. Carlson, J., denied motion for confirmation and granted motion to permit redemption at "stripped down" value. Sheriff's sale purchaser appealed. The Court of Appeals, 157 Wis.2d 13, 458 N.W.2d 536, LaRocque, J., affirmed. Purchaser petitioned for review. The Supreme Court, Ceci, J.,

held that mortgagor could redeem foreclosed farm land but only for amount of judgment entered in foreclosure action under state law plus allowable interest, costs, and taxes.

Reversed.

1. Appeal and Error 842(1)

Trial 141

Application of statute to undisputed set of fact is question of law, Supreme Court reviews questions of law independently and without deference to decisions of lower courts.

2. Mortgages 600(1)

Bankruptcy Code does not create right to redeem foreclosed mortgaged property at its "stripped down" value; purpose of applicable section of Code is to protect debtor-mortgagor from personal liability for amount of mortgage in excess of value of mortgaged property. Bankr.Code, 11 U.S.C.A. Sec. 506, 506(a, d); W.S.A. 846.13.

3. Mortgages 600(1)

Mortgagor could redeem foreclosed mortgaged

farm land for amount of judgment entered in foreclosure action plus interest, costs, and taxes, as provided by state law; mortgaged property could not be redeemed based on "stripped down" value of mortgaged property decided in Chapter 7 bankruptcy proceeding. Bankr. Code, 11 U.S.C.A. Section 506; W.S.A. 846.13.

4. Mortgages 591(1)

Right or equity of redemption for real estate is created and governed solely by state law. Bankr.Code, 11 U.S.C.A. Section 506; W.S.A. 846.13.

5. Bankruptcy 2363

Requiring mortgagor to redeem foreclosed mortgaged farm land for amount of judgment entered in foreclosure action as provided by state law, rather than for amount of "stripped down" value of mortgaged property as determined in Chapter 7 proceedings, did not deny mortgagor "fresh start" since mortgagor's personal liability for mortgage debt was discharged in exchange for

liquidation of assets. Bankr. Code, 11 U.S.C.A. Section 506, 701 et seq.; W.S.A. 846.14.

Raymond H. Scott and William A. Grunewald (argued), and Nikolay, Jensen, Scott, Gamoke & Grunewald, S.C., Medford, on the briefs, for appellant-petitioner.

George B. Goyke (argued), Terrence J. Byrne and Byrne Law Office, Wausau, on the brief, for defendants-respondents.

Donald B. Rintelman, Kenneth R. Nowakowski and Whyte & Hirschboeck, S.C., Milwaukee, amicus curiae, for Farm Credit Bank of St. Paul.

John E. Knight, James E. Bartzen and Boardman, Suhr, Curry & Field, Madison, amicus curiae, for Wisconsin Bankers Ass'n.

CECI, Justice.

This case is before the court on a petition for review of a decision of the court of appeals, Hobl v. Lord, 157 Wis.2d 13, 458 N.W.2d 536 (Ct.App. 1990). The majority of

the court of appeals (Cane, P.J., dissenting) affirmed an order of the circuit court for Taylor County, Gary L. Carlson, Circuit Judge. The circuit court's order denied a motion for confirmation of a sheriff's sale brought by Farm Credit Bank of Saint Paul, formerly known as The Federal Land Bank of Saint Paul (Farm Credit), and granted a motion to permit redemption brought by Donald Lord (Lord).1

One issue is presented on this review: whether a mortgagor may redeem mortgaged property under sec. 846.13 Stats.,2 for the

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1 Donald Lord and Ida Lord (his mother) were both mortgagors with regard to the property in question. Ida Lord passed away after Farm Credit foreclosed on the mortgage and before Donald Lord moved the circuit court to permit redemption.

2 Section 846.13 Stats., provides as follows:

846.13 Redemption from and satisfaction of judgment. The mortgagor, his heirs, personal representatives or assigns may redeem the mortgaged premises at any time before the sale by paying to the clerk of the court in which the judgment was rendered, or to the plaintiff, or any assignee thereof, the amount of such judgment, interest thereon and costs, and any costs subsequent to such

"stripped down"[3] value of the mortgaged property as determined by a bankruptcy court under 11 U.S.C. sec. 506 (1988) [hereinafter sec. 506].[4] We hold that a mortgagor may not

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judgment, and any taxes paid by the plaintiff subsequent to the judgment upon the mortgaged premises, with interest thereon from the date of payment, at the same rate. On payment to such clerk or on filing the receipt of the plaintiff or his assigns for such payment in the office of said clerk he shall thereupon discharge such judgment, and a certificate of such discharge, duly recorded in the office of the register of deeds, shall discharge such mortgage of record to the extent of the sum so paid.

3 The "stripped down" value of mortgaged property is the present value of the property as opposed to the amount of the lien against the property. The effect of sec. 506 in bankruptcy proceedings is to "strip down" a lien to the present value of the security when the amount of the lien exceeds the value of the security. (The security in the case at bar is the mortgaged property.) The creditor's claim then becomes an unsecured claim to the extent it exceeds the present value of the mortgaged property or other security. Matter of Lindsey, 823 F.2d 189, 189-90 (7th Cir.1987).

4 11 U.S.C. sec. 506 provides in relevant part as follows:

[Sec.] 506. Determination of secured status
(a) An allowed claim of a creditor secured by a lien on property in which the [bankruptcy] estate has an interest . . . is a secured claim to the extent of the value of

redeem mortgaged property under sec. 846.13 for its stripped down value as determined under sec. 506. We further hold that a mortgagor may only redeem the mortgaged property under sec. 846.13 for the amount of the judgment entered in the foreclosure action.5 Accordingly, we reverse the

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such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value [the value of the bankruptcy estate's interest in the property] shall be determined in light of the purpose of the valuation and of the proposed disposition or such of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

. . . .

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 520(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

5 In addition to the amount of the judgment entered in the foreclosure action, the mortgagor would have to pay interest, costs, and taxes as required by sec. 846.13. The mortgagor could also obtain the mortgaged

decision of the court of appeals and the order of the circuit court.

The facts relevant to this review are not in dispute. On December 23, 1987, the circuit court entered a judgment of foreclosure against Lord and in favor of the Federal Land Bank of Saint Paul (now Farm Credit) in the amount of $127,959.59.

Lord filed a Chapter 7 bankruptcy petition in the Bankruptcy Court for the Western District of Wisconsin (the bankruptcy court) on February 14, 1989. In Re: Donald Lord, Case No. EU7-89-00332. In his bankruptcy proceeding, Lord initiated a separate adversarial action against Farm Credit seeking, inter alia, redemption of the mortgaged premises. Donald Lord v. Farm Credit Bank of St. Paul, a/k/a Federal Land Bank of St. Paul and Estate of Ida Lord, Adversary No. 89-0062-7.

On April 25, 1989, the sheriff's sale was

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property by appearing at the sheriff's sale and making the highest bid. Section 846.10(2), Stats.

held pursuant to sec. 846.16, Stats. The record shows that Lord was present at the sheriff's sale but did not bid on the mortgaged property on the advice of his attorney. Richard Hobl (Hobl) was the successful bidder with a bid of $50,000.00.

By order dated May 23, 1989, the bankruptcy court established the present value of the mortgaged property as $48,000.00[6] and took under advisement Lord's request for redemption.

On June 1, 1989, Farm Credit moved the circuit court for confirmation of the sheriff's sale. One day later, the bankruptcy court discharged Lord as a Chapter 7 debtor. The bankruptcy court never ruled on Lord's motion to permit redemption.

On June 14, 1989, Lord moved the circuit court to permit him to redeem the mortgaged property for $50,000.00, the stripped-down

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6 Although the bankruptcy court valued the mortgaged property at $48,00.00, it is undisputed that the present value of the mortgaged property is $50,000.00.

value of the mortgaged property per the bankruptcy court's May 23, 1989, order. The circuit court held Farm Credit's motion to confirm the sheriff's sale and Lord's motion to permit redemption on June 14, 1989. By order entered July 18, 1989, the circuit court granted Lord's motion to permit redemption and denied Farm Credit's motion to confirm the sheriff's sale. In so ruling, the circuit court reasoned that, under the principle of federal supremacy, state redemption law must give way to federal bankruptcy law on the issues of the redemption price.

Hobl appealed from the circuit court's order.7 Hobl argued that Lord cannot redeem the mortgaged property for its stripped-down value because the bankruptcy court's strip-down is subject to state redemption law, and sec. 846.13, Stats., requires a mortgagor to

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7 The court of appeals concluded that Hobl had standing to appeal the circuit court's order. Hobl, 157 Wis.2d at 17-18, 458 N.W.2d 536. The issue of Hobl's standing is not before this Court.

pay the amount of the foreclosure judgment plus interest, costs and taxes to redeem mortgaged property. Thus, Hobl further argued that the circuit court's conclusion conflicts with the plain language of sec. 846.13.

The court of appeals rejected Hobl's argument and held that a bankrupt mortgagor may redeem mortgaged property under sec. 846.13 for its stripped-down value as determined by the bankruptcy court. Hobl, 157 Wis.2d at 16, 458 N.W.2d 536. The court of appeals reached this conclusion by harmonizing secs. 506 and 846.13. The court of appeals reasoned that, under the principles of statutory construction, it had to harmonize secs. 506 and 846.13 to avoid a conflict between sec. 506's provision that an under-secured lien8 is void to the extent it is not secured and sec. 846.13's provisions

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8 For purposes of this opinion, an undersecured lien is a lien for more than the value of the mortgaged property or other security.

that a mortgagor must pay the amount of the foreclosure judgment.

The court of appeals concluded that if a bankrupt mortgagor has to pay the amount of the foreclosure judgment to redeem his mortgaged property, the bankruptcy court's strip-down of the lien to the value of the mortgaged property is nullified. In other words, the court of appeals reasoned that since the unsecured portion of the lien is void under sec. 506, it cannot be enforced in a state redemption proceeding by requiring the mortgagor to pay the amount of the foreclosure judgment when said judgment is for an amount that exceeds the stripped-down value of the mortgaged property.

Therefore, the court of appeals held that the judgment which a bankrupt mortgagor must pay to redeem his property under sec. 846.13 is that part of the mortgage foreclosure judgment which survives the bankruptcy proceeds--the stripped-down value of the

mortgaged property. Hobl, 157 Wis.2d at 20-22, 458 N.W.2d 536.

Hobl petitioned this court for review of the decision of the court of appeals, which we granted.

[1] Application of a statute to an undisputed set of facts is a question of law. Kania v. Airborne Freight Corp., 99 Wis.2d 746, 758, 300 N.W.2d 63 (1981). We review questions of law independently and without deference to the circuit court or the court of appeals. Ball v. district No. 4, Area Board, 117 Wis.2d 529, 537, 345 N.W.2d 389 (1984). Accordingly, we will review the issue raised in this case without deference to the lower courts' decisions.

The gravamen of the court of appeals decision is the following: effect of sec. 506 is to allow a mortgagor to redeem the mortgaged property for its stripped-down value notwithstanding sec. 846.13's requirement that a mortgagor may only redeem mortgaged property for the amount of the

foreclosure judgment plus interest, costs and taxes. The court of appeals advanced only one rationale for its decision: "Requiring Lord to redeem by paying the full foreclosure judgment would effectively nullify the bankruptcy court's actions [stripping down the value of Farm Credit's lien to $50,000.000]". Hobl, 157 Wis.2d at 21, 458 N.W.2d 536.

[2] We disagree. Requiring Lord to redeem by paying the amount of the foreclosure judgment plus interest, costs and taxes does not nullify the bankruptcy court's action of stripping down Farm Credit's lien, because sec. 506 does not create a right to redeem mortgaged property at its stripped-down value. In Re Dewsnup, 908 F.2d 588, 592 (10th Cir.1990) (holding that "'it is obvious that Congress did not intend to permit a debtor to redeem his real property through the use of [sec.] 506(d)'" (quoting In Re Maitland, 61 B.R. 130, 135 (Bankr.E.D.Va.1986)), cert. granted---U.S.---

111, S.Ct. 949, 112 L.Ed.2d 1038 (1991). Rather, the purpose of sec. 506 in cases such as the one at bar is to protect the debtor/mortgagor from personal liability for the amount of the mortgage in excess of the value of the mortgage property in the form of a deficiency judgment. Matter of Hagberg, 92 B.R. 809, 811 (Bankr.W.D.Wis.1988).

This protection is accomplished by a three-step process. first, sec. 506(a) divides under-secured liens into secured and unsecured claims. Second, sec. 506(d) voids that portion of the lien which is unsecured. Third, the unsecured claim for the amount of the mortgage in excess of the stripped-down value of the mortgaged property is discharged when the debtor is discharged from the Chapter 7 proceedings.

[3] Therefore, the creditor/mortgagee may foreclose on the mortgaged property but may not seek a deficiency judgment for the difference between the amount of the foreclosure judgment and the proceeds of the

foreclosure sale, because sec. 506 has stripped down the amount of the lien to the value of the mortgaged property. Matter of Lindsey, 823 F.2d 189, 189-90 (7th Cir.1987) (holding that "[t]he combined effect of these subsections [506(a) and 506(d)] is to 'strip down' a lien to the value of the security"). As the court explained in Hagberg:

> It is now well settled that a chapter 7 discharge eliminates the debtor's in personam liability on a secured debt while the in rem liability of the property held as security is unaffected and may be enforced by the mortgagee postdischarge . . . Thus, if the mortgage debt is in default prior to the chapter 7 filing, or goes into default subsequently, the chapter 7 discharge will not prevent foreclosure of the mortgage. The discharge only protects the debt for the entry of a deficiency judgment should the collateral be insufficient to satisfy the debt.

Hagberg, 92 B.R. at 811 (Emphasis added; citations omitted.)

Requiring Lord to redeem by paying the full amount of the foreclosure judgment does not subject Lord to personal liability for the difference between the foreclosure judgment and the value of the mortgaged property in the form of a deficiency judgment.

Accordingly, the court of appeals erred when it concluded that requiring Lord to redeem by paying the full amount of the foreclosure judgment nullifies the actions of the bankruptcy court.

Thus, the court of appeals also erred when it created a right to redeem mortgaged property for its stripped-down value out of sec. 506's protection against deficiency judgments. The authority cited by the court of appeals and by Lord before this court does not support the creation of such a right.

The court of appeals decision relied upon Lindsey. In Lindsey, the mortgaged property's stripped-down value was $233,000.00 and was subject to a first and second mortgage of $209,000.00 and $341,000.00, respectively. The bankrupt mortgagor sought the permission of the bankruptcy court to continue to make the monthly payments specified in the first mortgage and requested that the bankruptcy court establish a payment schedule for the

stripped-down value of the second mortgage: $24,000.00. The bankruptcy court refused to grant the debtor's request, and the district court affirmed the decision of the bankruptcy court. Lindsey, 823 F.2d at 190.

[4] The seventh circuit court of appeals affirmed the lower courts' decisions for two reasons which illustrate that Lindsey cannot be used to support the court of appeals decision in the case at bar. Stated simply, the first rationale offered by the Lindsey court was the following: bankrupt mortgagors must look to state redemption law, not federal bankruptcy law, for relief from foreclosure proceedings. Id. at 191. As the court commented:

> So the liens were stripped down [by the bankruptcy court]. But once the stripdowns were complete the secured claims allowed in their stripped down amount, and given that only the two stripped-down creditors were in the picture (for they were senior, and there were not enough assets for junior creditors to get anything), the only thing that remained to do in the bankruptcy proceeding was to discharge the debtors and let the creditors foreclosure their stripped-down liens, subject to whatever rights of redemption the debtors might have, under state law, in the foreclosure

proceedings.

Id. (Emphasis added). The Lindsey court's first rationale for its decision emphasizes a tenet of black-letter law: the right or equity of redemption for real estate is created and governed solely by state law. See generally Peeples, The Proper Role of Section 506(d) in Chapter 7: Some Unavoidable Problems, Annual Survey of Bankruptcy Law 227, 256-59 (W.Norton, Jr. ed. 1990) [hereinafter Peeples]. Accordingly, sec. 506 does not create or govern bankrupt mortgagor's right of redemption.

The second rationale the Lindsey court offered for its decision was that "[i]t would be absurd to think that Chapter 7 could be used. . . just to reduce the amount due on a mortgage." Lindsey, 823 F.2d at 191. In the case at bar, Lord attempts to use Chapter 7 to do just that--reduce the amount due on his mortgage with Farm Credit from $127,000.00 to $50,000.00. While the bankrupt mortgagors sought a payment plan in Lindsey and Lord

seeks redemption for the stripped-down value in the instant case, the bankrupt mortgagor in Lindsey essentially sought the same result Lord attempts to achieve in the case at bar: using Chapter 7 to retain ownership of his encumbered property while reducing the amount of the encumbrance to the present value of the property.

The Lindsey court rejected this result because it would allow a mortgagor "in any period of depressed real estate values, when [the mortgagor's] liabilities exceeded his assets [to reduce his liabilities while retaining ownership of his property] simply by declaring bankruptcy." Id. Later, when real estate values rise, the mortgagor could then enjoy the increase in value free of the pre-bankruptcy mortgage. Id. Such a result would have the negative effect of encouraging mortgages to declare bankruptcy even if they could survive financially while paying off their mortgage. If mortgagors acted in such

a fashion, the banking system of this country could be devastated.

The foregoing analysis illustrates that Lindsey does not support the court of appeals decision. Lord cited to this court a number of cases to support the court of appeals decision. See Gaglia v. First Federal Savings & Loan Ass'n, 889 F.2d 1304 (ed Cir.1989); Matter of Folendore, 862 F.2d 1537 (11th Cir.1989); and In Re Zobnica, 109 B.R.814 (Bankr.W.D.Tenn.1990). None of the decisions Lord cited to this court support the court of appeals' conclusion that a bankrupt mortgagor may redeem property under sec. 506 for its stripped-down value.

In Gaglia, the bankrupt mortgagor, after receiving a Chapter 7 discharge, filed an adversarial action in bankruptcy court to avoid a second mortgage to the extent it was under-secured. The stripped-down value of the mortgaged property was $34,000.00 and was subject to first and second mortgages in the amounts of $28,873.50 and more than

$200,000.00, respectively. Gaglia, 889 F.2d at 1305.

The court voided the second mortgage to the extent it was not secured because the second mortgagee was no worse off with the voiding than with a foreclosure sale, given the fact that it was under-secured and the unsecured portion of its claim was dischargeable under sec. 506(d). Id. At 1308-09. However, the Gaglia court expressly rejected the result Lord seeks in the case at bar.

> Section 506, however, is not a redemption provision. . . Even after lien avoidance [of the second mortgage to the extent it is not secured], the Gaglias [the debtors] will not own the [mortgaged] property unencumbered. They will still be subject to First Federal's [first] mortgage and the SBA's [the second mortgagee's] claim to the extent it is secured. If the Gaglias are delinquent on the first mortgage First Federal has the right to foreclose, even if they can satisfy the SBA's secured claim against the remaining equity.

Id. at 1310 (Emphasis added; citation omitted).

Unlike the first mortgage in Gaglia, Farm Credit's mortgage is under-secured.

Therefore, Lord argues that the voiding of Farm Credit's mortgage to the extent it is under-secured allows him to redeem the mortgaged property for its stripped-down value. Lord's argument ignores the express prohibition of Gaglia that "[s]ection 506 . . . is not a redemption provision," id., and the purpose of sec. 506: to protect bankrupt mortgagors from personal liability in the form of deficiency judgments. Hagberg, 92 B.R. at 811.

The material facts in Folendore were almost identical to the facts in Gaglia. The bankrupt mortgagors sought to completely void a third mortgage because it was junior to mortgages that exceeded the value of the mortgaged property. Folendores, 862 F.2d at 1538. The court granted the bankrupt mortgagors' motion to void the third mortgage over the third mortgagor's objection that doing so would allow the bankrupt mortgagors to redeem the property. In response to that argument, the court commented:

> <u>Section 506(d) does not really 'redeem' the property of the debtor</u>. The Folendores' [the bankrupt mortgagors] only interest in the property is possession--the two banks [the first and second mortgagors] effectively own the property. While it is true that the Folendores might in the future pay off the [first and second] mortgages on the property, at this moment the bank could foreclose on the property and cut out the SBA [the third mortgagor] and the Folendores completely. . . . .<u>Section 506 does not give a debtor its property back [free of encumbrances] as some sort of windfall</u>.

Id. at 1310 (Emphasis added; citation omitted).

Lord argues that if the Folendores could void a third mortgage, he can void Farm Credit's mortgage to the extent it is undersecured and redeem the property for its stripped-down value. Lord's position ignores the fact that the Folendores had to completely pay off the first and second mortgages to retain their property. Lord's position also ignores the express language of the <u>Folendore</u> court's decision that "[s]ection 506 does not really 'redeem' the property of the debtor" and that "[s]ection 506 does not give a debtor its property back

[free of encumbrances] as some sort of windfall." Id. Lord seeks precisely what the Folendore court held he cannot have: redemption of his property under sec. 506 and the return of his property free of encumbrances.

The fact of Zobenica are similar to the facts of Gaglia and Folendore. In Zobenica, the bankruptcy court determined that the value of the mortgaged property was \$56,500.00. Zobenica, 109 B.R. at 820. The first and second mortgages secured claims of \$46,607.37 and \$70,000.00, respectively. Id. at 815. The bankrupt mortgagors requested that the bankruptcy court void the second mortgage on their property to the extent it was under-secured and allow them to retain ownership of the mortgaged property by paying off the first mortgage in full and by paying the second mortgagee the difference between the balance due on the first mortgage in full and by paying the second mortgagee the difference between the balance due on the

first mortgage and the stripped-down value of the mortgaged property. The bankruptcy court granted the bankrupt mortgagor's request. Id. at 821.

Lord argues that the bankruptcy court in Zobenica allowed the bankrupt mortgagors to, in effect, redeem the mortgaged property for its stripped-down value and that, therefore, we should allow him to redeem his mortgaged property for its stripped-down value of $50,000.00. We disagree.

The Zobenica court stated that "there is no Bankruptcy Code authorization for redemption of realty" but granted the bankrupt mortgagors' request because doing so "merely . . . [put] the parties in the position they would be in under applicable state law on redemption [Tennessee statues and common law.]" Id. at 821. The court concluded that under Tennessee common law, the bankrupt mortgagors could redeem the mortgaged property by paying the full amount due on the first mortgage and by paying the second

mortgagor the difference between the amount due on the first mortgage and the present value of the mortgaged property. Id.

In contrast, allowing Lord to redeem for the stripped-down value of the mortgaged property would not put the parties in the same position as they would be in under Wisconsin redemption law. Under sec. 846.13, Stats., a mortgagor may only redeem the mortgaged property for the full amount of the foreclosure judgment plus interest, costs and taxes.

Moreover, under sec. 846.10(2), Stats., any party, including a mortgagee, may bid at the sheriff's sale. Allowing Lord to redeem the mortgaged property for its stripped-down value would deprive mortgagees of this valuable right.9. In holding that a

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9 We recognize that the mortgagee in the case at bar, Farm Credit, did not exercise its right to bid at the sheriff's sale. However, when this court decides a case, we not only adjudicate the rights of the parties to the case, but also set precedent for all similarly situated parties in the future. Accordingly, we must consider the effect of allowing Lord to redeem the mortgaged

mortgagor cannot redeem mortgaged property for its stripped-down value under sec. 506, the Dewsnup court explained the significance of a mortgagee's right to bid at foreclosure sales.

> At [a foreclosure] sale, a senior lienholder could purchase the property and sell it at some later time in anticipation of a change in land values. If there were two or more claims or mortgages, the junior lienholder could purchase the property, pay the senior lienholder, then inventory the property for later sale in hope of decreasing the amount of loss. In today's real estate market, these are very real considerations. Allowing [a mortgagor to redeem mortgaged property for its stripped -down value] denies creditors these options.

Dewsnup, 908 F.2d at 593. Moreover, as previously discussed, allowing a mortgagor who redeemed mortgaged property for its stripped-down value to enjoy any later increase in value of the mortgaged property free of the pre-bankruptcy mortgage would encourage mortgagors to file bankruptcy and thereby harm the banking system.

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property for its stripped-down value on mortgagees' rights under Sec. 846.10.

[5] In addition to citing the previously discussed cases, Lord makes two arguments to support the court of appeals decision. First, denying him the right to redeem the mortgaged property deprives him of the "fresh start" provided by his Chapter 7 discharge. Second, allowing him to redeem the mortgaged property for its stripped-down value does not work a bad result because similar results are produced under Chapters 11, 12 and 13 of the bankruptcy code.10 We disagree.

Liquidating Lord's encumbered assets, to wit, the mortgaged property, is not inconsistent with Chapter 7's "fresh start". The basic premise underlying Chapter 7 is the liquidation of assets in exchange for the discharge of debts. As the court observed in Lindsey,

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10 We do not address Lord's arguments concerning secs. 806.07(1)(e), 806.19(4) and 846.14, Stats., for two reasons. First, the arguments were raised for the first time on appeal. Wirth v. Ehly, 93 Wis.2d 433, 443-44, 287 N.W.2d 140 (1980). Second, none of the procedures provided by these sections were initiated by Lord in the proceedings below

> Chapter 7 of the Bankruptcy Code. . . contemplates the liquidation of the bankrupt estate. The real estate is the only asset of the estate; liquidation of the estate means sale of the real estate. Nothing in section 506 suggests the contrary. If the Lindseys [the bankrupt mortgagors] wanted to hold on to their property they should have sought reorganization under Chapter 13. In a reorganization, secured creditors may be prevented from foreclosing; may be forced to substitute a new security interest for their original interest; may experience, in short, the terrors of 'cram down'. . . There is no cram down in a liquidation. Liquidation is liquidation.

Lindsey, 823 F.2d at 191. In short, the price of a Chapter 7 discharge is liquidation. Accordingly, denying Lord the right to redeem the mortgaged property for its stripped-down value does not deprive him of his "fresh start". Rather, it denies him a windfall.

Futhermore, while a mortgagor may keep his mortgaged property and reduce the lien against it to its stripped-down value, under Chapters 11, 12 and 13 of the bankruptcy code, cases under those chapters are significantly different from Chapter 7 cases for two reasons. First, secured or unsecured

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While the federal courts are split on the question of whether sec. 506 may be used to void liens to the extent that they are under-secured,12 no federal or state authority exists to support the court of appeals' conclusion that sec. 506 has the effect of permitting a debtor to redeem property for its stripped-down value. Futhermore, every federal court which has considered the issue presented by the case at bar has rejected the court of appeals' conclusion that sec. 506 has the effect of permitting a debtor to redeem property for its stripped-down value. Moreover, the court of appeals' conclusion is contrary to public policy because it encourages mortgagors who can afford to pay their mortgages to file for bankruptcy in order to reduce their liabilities while retaining ownership of their mortgaged

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12 See Peeples at 267-68 n. 44 and cases cited therein, 3 Collier on Bankruptcy, par. 506.07 at 506-74 to 506-75 nn. 23-26 (15th ed. 1991), and cases cited therein.

property.[13] Accordingly, we conclude that the court of appeals erred when it held that Lord may redeem the mortgaged property for its stripped-down value.

The decision of the court of appeals is reversed.

BABLITCH, J., withdrew from participation.

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13 Furthermore, the court of appeals decision violates public policy because it encourages Chapter 7 bankruptcies in contrast to the congressional preference for reorganizations. Dewsnup, 908 F.2d at 592.

B

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 5, 1990

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1)

NOTICE
This opinion is subject to further editing. If published, the official version will appear in the bound volume of The Official Reports.

No. 89-1759

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

RICHARD HOBL,

Appellant,

FARM CREDIT BANK OF SAINT PAUL, formerly known as THE FEDERAL LAND BANK OF SAINT PAUL,

Plaintiff,

v.

DONALD LORD and IDA LORD,

Defendants-Respondents.

APPEAL from an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Richard Hobl, the successful bidder at the sheriff's sale, appeals an order in a real estate mortgage foreclosure action denying the motion for confirmation of the sheriff's sale and allowing Donald Lord, the bankrupt mortgagor,[1] to redeem his farm by paying to the mortgagee, Farm Credit Bank of Saint Paul, the property's fair value rather than the amount of the pre-bankruptcy judgment. We hold that the term "judgment" in sec. 846.13, Stats., means that part of the

[1] Donald Lord's mother, Ida Lord was also a mortgagor. However, after Farm Credit foreclosed, but before Donald moved for redemption, Ida passed away.

mortgage foreclosure judgment that survives bankruptcy proceedings.[2] Consequently, because Lord's personal liability for his debt to Farm Credit was discharged in bankruptcy and Farm Credit's lien against the farm was "stripped down" to the value of the real estate under 11 U.S.C. sec. 506 (1979), the only part of the judgment that survived was an amount equal to the value of the real estate. Lord properly redeemed by

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[2] Section 846.13 provides in part:

> The mortgagor ... may redeem the mortgaged premises at any time before the sale by paying ... the amount of such judgment, interest thereon and costs, and any costs subsequent to such judgment, and any taxes paid by the plaintiff subsequent to the judgment upon the mortgaged premises, with interest thereon from the date of payment, at the same rate.

paying this amount, and we thus affirm the order of the trial court.

Farm Credit foreclosed on Lord's farm mortgage and received a judgment in the amount of $127,959.59, which included the amount of the mortgaged debt plus interest, costs and attorney fees. Lord subsequently filed for sheriff's sale of the farm, Hobl was the successful bidder in the amount of $50,000. Before the confirmation hearing, the bankruptcy court entered an order discharging Lord of all personal liability to Farm Credit. In Lord's adversary proceeding against Farm Credit under sec. 506, the bankruptcy court valued the real estate at $48,000.[3]

At the confirmation hearing, Lord moved for redemption of the property in the amount of $50,000. Hobl does not argue that

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[3] Although the bankruptcy court valued the farm at $48,000, Lord concedes that the farm's fair value is $50,000.

Lord's redemption is too late because it was made after the sheriff's sale. Hobl concedes that "sale" under sec. 846.13, Stats., means the confirmation of the sale. *See Gerhardt v. Ellis,* 134 Wis. 191, 196, 114 N.W. 495, 496 (1908) ("It is clear that the title does not pass until confirmation so as to vest the purchaser with the right of possession. And it is equally clear that the right of redemption is not barred until confirmation of the sale."). The trial court granted the motion, finding that the state redemption statute must give way to federal bankruptcy law as to the redemption price, thus Lord had right to redeem in the amount of the property's value determined by the high bid at the sheriff's sale. Hobl filed a motion in the trial court to intervene as a formal party to the action for the purpose of filing an appeal. The trial court denied the motion.

A preliminary issue is whether Hobl has standing to appeal the trial court's order. A person may not appeal a judgment or an order unless he or she is aggrieved by it. *See Ford Motor Credit Co. v. Mills,* 142 Wis. 2d 215, 217, 418 N.W.2d 14, 15 (Ct. App. 1987). A person is aggrieved if the judgment or the order bears directly and injuriously upon his or her interests. *Id.* A person may be an aggrieved party entitled to appeal a judgment or an order even though he or she is not a named party to the suit. *Id.* at 218, 418 N.W.2d at 15.

Lord argues that Hobl is not aggrieved because the only issue in the trial court was the redemption price and Hobl was not entitled to receive any portion of an increased redemption price. This argument ignores the fact that if the trial court improperly allowed Lord to redeem at the stripped-down price, Hobl was improperly

denied consideration and likely confirmation of his bid. Because we agree that Hobl was aggrieved, we hold that he was standing to bring this appeal.

We next turn to the bankruptcy proceeding's effect on Lord's redemption. Hobl argues that the bankruptcy judgment merely relieved Lord from all personal liability for the mortgage debt. He asserts that Farm Credit's lien against the farm in the amount of the total mortgage foreclosure judgment survived unaffected by the bankruptcy proceedings and thus Lord can only redeem by paying this total judgment amount as required by sec. 846.13, Stats. However, Lord initiated an adversarial proceeding in the bankruptcy court under sec. 506. That section provides in part:

> (a) An allowed claim
>
> of a creditor secured by a lien on property in which the estate has an interest ... is a

> secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim ...
>
> ....
>
> (d) *To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void ....* (Emphasis supplied.)[4]

Although courts are not in agreement concerning the effect of sec. 506,[5] the seventh circuit has stated that

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[4] The legislative comment to sec. 506(d) provides: "(I)f a party in interest requests the court to determine and ... disallow the claim secured by the lien ... and the claim is not allowed, then *the lien is void to the extent that the claim is not allowed.*" (Emphasis supplied.)

[5] Hobl cites *In re Dewsnup,* 87 B.R. 676 (Bankr. D. Utah 1988), and *In re Shrum,* 98 B.R. 995 (Bankr. W.D. Okla. 1989), for the proposition that sec. 506 is not available to a ch. 7 debtor for the purpose of voiding a lien to the extent that it is

"(t)he combined effect of these subsections is to 'strip down' a lien to the value of the security." *In re Lindsey,* 823 F.2d 189, 189-90 (7th Cir. 1987). In *Lindsey,* farmers owned real estate subject to a first mortgage of $209,000 and a second mortgage of $341,000. They filed for bankruptcy under ch. 7, and the farmers asked the bankruptcy court to strip down the mortgages under sec. 506. The bankruptcy court found the current value of the real estate to be $233,000 so that all of the first mortgage but only $24,000 of the second was secured. The seventh circuit stated that:

> (O)nce the stripdowns were complete and the secured claims allowed in their stripped-down amount ... the only thing that remained to do in the bankruptcy proceeding was to discharge the debtors and let the creditors foreclose their

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not an allowed secured claim.

> stripped-down liens, subject to whatever rights of redemption the debtors might have, under state law, in the foreclosure proceedings.

Id. at 191.

Hobl argues that *Lindsey* cannot be cited as authority or a ch. 7 debtor to accomplish redemption at a stripped-down value. It is true that this was not the issue in *Lindsey*.[6] However, we chose to follow *Lindsey's* interpretation of sec. 506 and conclude that Farm Credit's lien against the farm was reduced to fair value. Lord argues that this conclusion results in a conflict between sec. 506 and the redemption provisions of sec. 846.13, Stats., and that the bankruptcy provision preempts the state statute.

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[6] The issue in *Lindsey* was whether the ch. 7 debtors, after the stripdown, could then prevent the creditor from foreclosing the stripped-down lien. The seventh circuit held that they could not.

Our interpretation of sec. 846.13, Stats., avoids the conflict. We must harmonize the federal bankruptcy provision with sec. 846.13 if possible. *See State v. Burkman,* 96 Wis. 2d 630, 642, 292 N.W.2d 641, 647 (1980) (state statutes harmonized). Bankruptcy and redemption statutes are remedial in nature and, as such, are to be liberally construed in favor of the debtor. *See State Central Credit Union v. Bigus,* 101 Wis. 2d 237, 241, 304 N.W.2d 148, 150 (Ct. App. 1981) (bankruptcy); *Skatch v. Sykora,* 127 N.E.2d 453, 457 (Ill. 1955) (redemption).

Construction of a statute and its application to a particular set of facts is a question of law. *State v. Mattson,* 140 Wis. 2d 24, 27-28, 409 N.W.2d 138, 140 (Ct. App. 1987). The primary purpose of statutory construction is to ascertain the legislative intent and give effect to that

intent. *County of Columbia v. Bylewski,* 94 Wis. 2d 153, 164, 288 N.W.2d 129, 137 (1980). Even where a statute appears unambiguous on its face, it can be rendered ambiguous by its interaction with and relation to other statutes. *State v. White,* 97 Wis. 2d 193, 198, 295 N.W.2d 346, 348 (1980).

Section 846.13, Stats., gives Lord the right to redeem his farm for the amount of the judgment.[7] A judgment on foreclosure is a judicial determination of the amount of the mortgagee's lien. *See Marshall & Ilsley Bank v. Greene,* 227 Wis. 155, 164, 278 N.W. 425, 429 (1938). Although the circuit court found the amount of the lien to be almost $128,000, the bankruptcy court reduced the lien to present value. In the language of sec. 506(d), the amount of the judgment in

[7] Lord has agreed to pay outstanding real estate taxes and does not claim the bankruptcy eliminated that obligation.

excess of the fair value was "void". Requiring Lord to redeem by paying the full foreclosure judgment would effectively nullify the bankruptcy court's actions. In order to give the bankruptcy court's stripdown the effect intended, we hold the "judgment" as used in sec. 846.13 means the amount of the judgment that survives bankruptcy proceedings.[8]

Hobl next argues that even if sec.

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[8] The dissent relies on *In re Hagberg,* 92 B.R. 809, 811 (Bankr. W.D. Wis. 1988), proclaiming that a ch. 7 discharge eliminates the debtor's in *personam* liability o a secured debt, while the *in rem* liability is unaffected. This general tenet cannot be disputed. *Hagberg,* however, did not discuss the effect of sec. 506(d) on *in rem* liability. Other bankruptcy courts that have discussed the issue have concluded that liens survive discharge only so long as they are not avoided during the bankruptcy proceedings. *See In re Cassi,* 24 B.R. 619, 624 (Bankr. N.D. Ind. 1982). Lord's motion in bankruptcy court to disallow the lien for all but the fair value of the property was effectively granted by the bankruptcy court and thus voided all of Farm Credit's lien except for the $48,000.

506 preempts sec. 846.13, Stats., in this case the bankruptcy court merely found the present value of the property to be $48,000 and took all other matters relating to Lord's redemption rights under advisement. He asserts that absent more from the bankruptcy court, the redemption requirement under sec. 846.13 must be followed.

Lord counters by arguing that under sec. 506, after the bankruptcy court determined the property's value, it need not have proceeded further because once it determined the value of the secured claim, the remaining unsecured balance was discharged. We agree that nothing more is required under sec. 506 in order to effect its provisions. Section 506(d) states that the unsecured portion of the lien is void and provides for only two exceptions to this

rule,[9] neither of which apply in the present case. Consequently, the lien was stripped down, and Lord properly redeemed by paying the stripped-down amount.

By the Court--Order affirmed.

Recommended for publication in the official reports.

.011237

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[9] Section 506(d) applies unless:

> (1) a party in interest has not requested that the court determine and allow or disallow such claim under section 502 of this title; or
> (2) such claim was disallowed only under section 502(e) of this title.

CANE, P.J. *(dissenting)*. The majority holds that a postpetition bankruptcy debtor may, as a matter of Wisconsin law, redeem his mortgaged property by paying its fair value, rather than the amount of the judgment. I concur with that part of the decision that states that Richard Hobl has standing to bring this appeal. However, because the majority erroneously perceives a conflict between Wisconsin and federal bankruptcy law, and because they misconstrue *In re Lindsey,* 823 F.2d 189 (7th Cir. 1987), I dissent from the remainder of the opinion.

I agree with the analysis set forth in *In re Hagberg,* 92 B.R. 809, 811 (Bankr. W.D. Wis. 1988), where the court stated:

> It is now well settled that a chapter 7 discharge eliminates the debtor's *in*

> *personam* liability on a secured debt while the *in rem* liability of the property held as security is unaffected and may be enforced by the mortgage postdischarge. *See In re Lindsey,* 823 F.2d 189, 191 (7th Cir. 1987) ... The discharge only protects the debtor from the entry of a deficiency judgment should the collateral be insufficient to satisfy the debt.

This general rule, that discharge from bankruptcy only affects personal liability, has long been the rule in Wisconsin's state courts; *see Charnesky v. Urban,* 245 Wis. 268, 273, 14 N.W.2d 161, 163 (1944), and federal courts, *see United States v. Midwest Livestock Prods. Coop.,* 493 F. Supp. 1001, 1002 (E.D. Wis. 1980); *Hagberg,* 92 B.R. at 811; *In re Geiger,* 12 B.R. 410, 411 (Bankr. E.D. Wis. 1981), as well as a recognized black letter law principle, *see* 9A Am. Jur. 2d *Bankruptcy* sec. 779, at 513 (1980).

The majority reads sec. 506(d) of the bankruptcy code, as interpreted in *Lindsey,* to require allowing Lord to redeem his property at fair value, that is, the stripped-down value of the lien.[1] I disagree. As stated in *Lindsey:*

> Section 506 gives [the mortgage holder] a secured interest that he can foreclose

Once we reach the conclusion that sec. 506 discharges only personal liability, and therefore does not affect state redemption law, it would be absurd to

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[1] The majority purports to follow the seventh circuit's interpretation of sec. 506(d), while acknowledging other federal courts have explicitly rejected the conclusion they derive from *Lindsey*. *See In re Shrum,* 98 B.R. 995, 1002 (Bankr. W.D. Okla. 1989); *In re Dewsnup,* 87 B.R. 676, 682-83 (Bankr. D. Utah 1988). I do not believe *Lindsey,* if followed, compels the result the majority reaches. However if *Lindsey* did compel that result, I would choose to follow federal court decisions concluding that ch. 7 releases only the debtor's personal liability.

construe sec. 846.13, Stats., in the manner urged by the majority. That statute provides: "The mortgagor ... may redeem the mortgaged premises ... by paying to the clerk of the court in which the judgment was rendered ... the amount of such judgment...."

The statute clearly provides for payment of the amount of the judgment rendered in circuit court. This interpretation in no way discriminates against those discharged from bankruptcy. They have exactly the same rights at the foreclosure sale and upon redemption as any other individual, and no obligation to participate in either. The majority's conclusion rewrites Wisconsin's redemption statutes, a matter properly left to the legislature's discretion.

Lord was not entitled under sec. 846.13, Stats., to redeem his property at

its fair value. Consequently, I would reverse and remand either for the payment by Lord of the full amount of the judgment, or confirmation of the sale to Hobl.

> on equal to the market value of his interest, and makes him an unsecured creditor for the rest, which is all that a judgment creditor is anyway. ...
>
> What the statute does for the debtor ... is enable him to precipitate the foreclosure proceedings ... in order to minimize the secured claims and thus increase the amount available for the unsecured creditors.

Id. at 191. The court's conclusion in *Lindsey* is that sec. 506(d) is a device to allow debtors to bring mortgage holders into the bankruptcy proceeding, not to erase the traditional distinction between personal and

in rem liability.[2] *Lindsey* explicitly states that redemption rights, if available, are subject to state law. *Id.* As an end result of the majority's decision, Lord's judgment is reduced from approximately $128,000 to $50,000, an outcome specifically decried in *Lindsey, Id.* As *Hagberg* states, *Lindsey* is consistent with the proposition that ch. 7 discharges only personal liability.

.011241

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[2] In this case, the bankruptcy court merely found $48,000 to be the fair value of the property. Had Lord explicitly requested that the bankruptcy court disallow the lien and allow redemption at fair value, a different analysis would have to be followed.

C

STATE OF WISCONSIN
CIRCUIT COURT TAYLOR COUNTY

THE FEDERAL LAND BANK OF SAINT PAUL,

Plaintiff,

v.

DONALD LORD and IDA LORD,

Defendants.

ADDITIONAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Case No. 87-CV-113

The Motion of Plaintiff, Federal Land Bank of St. Paul, to confirm the Sheriff's Sale and the Motion of the Defendant, Donald Lord, to Permit Redemption was heard at 1:00 p.m. on June 14, 1989. The parties appearing at said hearing were Attorney Steven R. Cray for Federal Land Bank, Attorney Terrence J. Byrne for Donald Lord, Donald Lord personally, Attorney Raymond H. Scott for Richard Hobl and Richard Hobl personally. Based upon the Findings of Fact and Conclusions of Law of the Court dictated on the record herein, the documents on file

herein, the testimony presented herein and the arguments of counsel pertaining to the Defendant Donald Lord's Motion to Permit Redemption and on the Plaintiff's Motion for Confirmation of the Sheriff's Sale,

THE COURT HEREBY MAKES AS ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AS FOLLOWS:

1. That the Agricultural Credit Act Title 12 Section 1229 does not apply in this matter because Farm Credit Bank did not obtain title to the property, and was not the owner of the property. Therefore, the Court determines that the Defendant Donald Lord has no right of first refusal pursuant to the Agricultural Credit Act.

2. That the Defendant, Donald Lord, filed a bankruptcy under Chapter 7 of the United States Bankruptcy Code and, as shown by the documents on file herein filed by the Defendant, the Defendant was discharged on

June 2, 1989 of any obligation to the Plaintiff except for the secured value of the lien against the Defendant's real estate. The entire value of the property subject to the Plaintiff's lien is $55,000.00. The Court determines that the value of the real estate was established by the bid at the Sheriff's Sale by Richard Hobl of $50,000.00 plus delinquent and accrued real estate taxes of approximately $5,400.00. The Defendant, Donald Lord, has paid $50,000.00 to redeem the property to the Clerk of Courts. The Defendant, Donald Lord, is entitled to redeem the property for said $50,000.00, to be paid to Farm Credit Bank. The property shall remain subject to the existing and delinquent real estate taxes and the Defendant shall be obligated to pay such taxes.

3. The Court finds that the Defendant, Donald Lord did not mislead Richard Hob and

that although Mr. Lord and Mr. Hobl had various conversations pertaining to Donald Lord's indecision as to whether to purchase the property, and ability or inability to purchase the property, that none of such discussions and conversations were intended to mislead nor did it mislead Richard Hobl as to Donald Lord's desire to purchase.

4. That the equities pertaining to allowing the Defendant, Donald Lord to redeem the property are in his favor, specifically the fact that the farm has been owned and maintained by the family for many years. There are strong emotional ties to the property held by the Lords, and permitting the foreclosure would result in essence a forfeiture of any interest in the property of Donald Lord and the rights of the Defendant, Donald Lord to redeem.

<u>Order</u>

NOW THEREFORE, upon the above Findings

of Fact and Conclusions of Law as well as the findings and conclusions rendered orally by the Court, IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Defendant, Donald Lord, shall be entitled to redeem the property by payment to Farm Credit Services forthwith of $50,000.00. The trust check of $50,000.00 paid to the Clerk of Courts shall be returned to Byrne Law Office.

2. That the $5,000.00 placed on deposit by Richard Hobl pursuant to the Sheriff's Sale, shall be returned by Attorney Raymond Scott.

3. That the Plaintiff's Motion for Confirmation of the Sheriff's Sale is denied in view of the Court's ruling that the Defendant is entitled to redeem. Upon payment of the redemption amount as specified, the Judgment of Foreclosure shall be and is hereby ordered satisfied and the

Lis Pendens shall be released.

4. That no costs shall be awarded to either party.

5. That the above captioned foreclosure action shall be dismissed and the Judgment of Foreclosure satisfied.

Dated this 26 day of June, 1989.

BY THE COURT:

____

Hon. Gary L. Carlson
Circuit Court Judge

.011242

D

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

DONALD LORD Case No. EU7-89-00332

Debtor.

DONALD LORD,

Plaintiff, ORDER

vs.

FARM CREDIT BANK OF ST. PAUL
a/k/a a Federal Land Bank
of St. Paul;and
ESTATE OF IDA LORD,

Defendants.

On April 21, 1989, a hearing was held on the above referenced adversarial action based on the prayer for relief of the Plaintiff, Donald Lord, for evaluation pursuant to 11 USC Sec. 506 and for the right of redemption of the subject matter real estate. The Court also considering the Motion of Farm Credit Bank for a dismissal of the adversarial action. Appearing at the

hearing was the Plaintiff-Debtor, Donald Lord, in person with his attorney, Terrence Byrne of the Byrne Law Office. The Defendant, Farm Credit Bank of St. Paul appeared by Steven R. Cray of the law firm Wiley, Rasmus, Wahl, Colbert, Norseng and Cray, S.C. No appearance was made by the Defendant, Estate of Ida Lord.

The Court, having duly considered the pleadings and documents on file, having heard testimony and arguments of counsel and being duly and sufficiently advised in the premises;

IT IS HEREBY ORDERED that the present value in the real estate is in the sum of $48,000.00.

IT IS FURTHER ORDERED that the Court's decision as to the relief requested by the Plaintiff and the Defendant's Motion to Dismiss is taken under advisement until

further review and determination of this Court.

Dated this 23rd day of May, 1989.

BY THE COURT:

Thomas S. Utschig
Bankruptcy Court Judge

.011243

E

1 U.S.C. Sec. 506(a)

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. Sec. 506(d)

To the extent that a lien secures a claim against the debtor that is not an allowed

secured claim, such a lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. Sec. 727

(a) The court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case--

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan

in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii). the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not

a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be

property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of--

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

11 U.S.C. Sec. 524

(a) A discharge in a case under this title--

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not a discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim

that is excepted from discharge under section 523, 1228(a)(1), or 1328(c)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if--

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case

under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) such agreement contains a clear and conspicuous statement which advises

the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that such agreement--

(A) represents a fully informed and voluntary agreement by the debtor; and

(B) does not impose an undue hardship on the debtor or a dependent of the debtor;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later,

by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which

the debtor shall appear in person. At any such hearing, the court may inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall

(1) inform the debtor--

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of--

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement;

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

Article I, Section 8, Clause 4.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 846.13, Wis. Stats.

The mortgagor, his heirs, personal representatives or assigns may redeem the mortgaged premises at any time before the sale by paying to the clerk of the court in which the judgment was rendered, or to the plaintiff, or any assignee thereof, the amount of such judgment, interest thereon and costs, and any costs subsequent to such judgment, and any taxes paid by the plaintiff subsequent to the judgment upon the mortgaged premises, with interest thereon from the date

of payment, at the same rate. On payment to such clerk or on filing the receipt of the plaintiff or his assigns for such payment in the office of said clerk he shall thereupon discharge such judgment, and a certificate of such discharge, duly recorded in the office of the register of deeds, shall discharge such mortgage of record to the extent of the sum so paid.

Rule 14.1 (h) statement:

This petition seeks review of the judgment of a state court of last resort. This section is intended to present to the Court the references to the federal question in the lower courts to show that the right has not been waived. Here, it is apparrent that the federal question has been central in each action heard and decision rendered below.

The initial instance in which the question of federal law utilized in this appeal arose occurred in the Bankruptcy Court. There, the Debtor sought the voiding of the lien of Farm Credit Bank to the extent the amount of the lien exceeded the value of its collateral. The bankruptcy judge valued the collateral at $48,000, but withheld determination that the Debtor could redeem the property for that amount pending further consideration. The determination came in the form of a motion to the bankruptcy court requesting that the creditor's lien be

evaluated pursuant to 11 U.S.C. sec. 506 for the purpose of voiding the lien as to the allowed unsecured claim, and that the debtor be given the right to redeem the property. The bankruptcy court stated "It is hereby ordered that the present value of the real estate is $48,000. It is further ordered that the Court's decision as to the relief requested by the Plaintiff and the Defendant's Motion to Dismiss is taken under advisement until further review and determination of this Court."

The Debtor received a bankruptcy discharge shortly after the bankruptcy judge's decision, and the alert creditor took advantage of the expiration of the automatic stay of 11 U.S.C. sec. 362 upon the discharge order to hold a sheriff's sale. Lord moved for redemption of his property at the same time as the hearing on confirmation of the sheriff's sale was scheduled. Lord argued, and the circuit court judge agreed, that the lien upon the property did not exceed the

fair market value of the property following the bankruptcy court's determination and the bankruptcy discharge. The circuit court specifically referenced the bankruptcy discharge in determining that Lord could redeem his property for its fair value. Again, the effect of the bankruptcy discharge and lien avoidance upon Lord's redemption rights were argued before the circuit court judge, and the circuit court in effect acknowledged the supremacy of the federal law through holding that the judgment lien had been reduced.

The Wisconsin Court of Appeals harmonized sec. 846.13, Wis. Stats., and the bankruptcy law when presented with the arguments of the parties. It determined that the bankruptcy reduced the lien, and that the reduced lien could be redeemed pursuant to state law. It held that the word "judgment" in the Wisconsin statute means the amount of the judgment which survives bankruptcy proceedings. The debtors were then able to

redeem for the stripped-down amount.

At the Wisconsin Supreme Court level, the sheriff's sale's high bidder objected to the Court of Appeals' harmonization of Lord's federal bankruptcy rights with the right to redeem real estate under state law. Like the courts below, the Wisconsin Supreme Court spent substantial effort discussing the effect of Lord's bankruptcy discharge and lien stripping upon his right to redeem his real estate under state law. Rather than citing the references here, the Court is referred to the entire decision as set forth in this appendix, as the decision is replete with references to the interplay of the federal and state statutes. Despite its acknowledgement of the federal statute, however, the Wisconsin court determined that its own statute was unefected by Lord's bankruptcy, reversing each of the three courts below. It is from this decision that review is sought.

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NO. 91-539

In The
SUPREME COURT OF THE UNITED STATES
October Term 1991

DONALD LORD,

Petitioner,

vs.

FARM CREDIT BANK OF ST. PAUL
f/k/a Federal Land Bank of
St. Paul and RICHARD HOBL,

Respondents.

On Petition For a Writ of
Certiorari to the Supreme Court
for the State of Wisconsin

BRIEF FOR THE RESPONDENT RICHARD HOBL IN OPPOSITION

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STATEMENT OF THE CASE

The respondent, Farm Credit Bank of St. Paul f/k/a Federal Land Bank of St. Paul (hereinafter "Farm Credit"), obtained a judgment foreclosing its mortgage on real estate owned by Donald Lord (hereinafter "Lord") in the Circuit Court for Taylor County, Wisconsin on December 23, 1987. That judgment determined the amount of the mortgage debt, with interest, costs and attorney's fees to be $127,959.59. (R. 3, p. 2)[1] After the redemption period of Wisconsin Statute section 846.13 expired, Farm Credit scheduled a foreclosure sale for February 14, 1989. (R. 4) However, Lord filed a Chapter 7 bankruptcy petition in the Bankruptcy Court for the Western

[1] Indicates record on appeal in the Wisconsin Supreme Court.

District of Wisconsin. After relief from stay was obtained, the foreclosure sale was adjourned and renoticed for March 28, 1989. (R. 7) The foreclosure sale was again adjourned and renoticed for April 25, 1989. (R. 12) Respondent, Richard Hobl (hereinafter "Hobl") was the successful bidder at the sheriff's sale. Hobl's successful bid was $50,000.00. Lord attended the foreclosure sale but, upon instructions from his attorney, did not bid. (R. 49, p. 16) Hobl was the only bidder at the sheriff's sale. (R. 49, p. 7) The Taylor County Sheriff filed his Report of Sale on April 27, 1989, and on May 30, 1989, Farm Credit moved the trial court for confirmation of the sale. (R. 14)

Lord was discharged in bankruptcy on June 2, 1989. (R. 15, p. 13) On the day of the confirmation hearing (June 14,

1989), Lord, without prior notice to the interested parties, filed a motion to permit redemption for $50,000.00 (the price bid at the sheriff's sale) and paid that amount in to the trial court. (R. 49, p. 14) Lord argued that because of his bankruptcy discharge the *in personam* judgment against him was satisfied and that all that remained was the *in rem* action against the property serving as security for the discharged debt. (R. 15, p. 1) As a result, Lord argued that he should be entitled to redeem for $50,000.00, the amount of the successful bid. (R. 15, p. 1)

Prior to this, Lord filed an adversary proceeding in his Chapter 7 bankruptcy requesting an evaluation pursuant to 11 U.S.C. sec. 506 and redemption of the subject matter real estate. The Bankruptcy Court entered an

order on May 23, 1989 finding that the present value of the real estate was $48,000.00 and took under advisement Lord's requested evaluation and redemption and a motion filed by Farm Credit to dismiss.[2] The Bankruptcy Court never ruled on Lord's request for redemption and on July 23, 1991 dismissed the adversary proceeding. (See appendix)

The trial court heard Farm Credit's motion for confirmation of the sale and Lord's motion to redeem the property on June 14, 1989. The trial court permitted Lord to redeem the property for the $50,000.00 bid price plus the payment of delinquent taxes despite Wisconsin Statute section 846.13, which requires

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[2] Lord's arguments in his petition are prefaced on his assumption that the Bankruptcy Court ordered a strip-down of Farm Credit's mortgage. It is clear that the court did not do so but merely took Lord's request under advisement.

payment of the full foreclosure judgment to redeem. The trial court denied confirmation of the sheriff's sale. (R 49, p. 25)

Hobl appealed the trial court's decision to the Wisconsin Court of Appeals, District III. On June 5, 1990, the Court of Appeals released its 2-1 decision affirming the trial court. Hobl v. Lord, 157 Wis.2d 13, 458 N.W.2d 536 (Ct. App. 1990)

The majority of the Wisconsin Court of Appeals perceived a conflict between Section 506 of the Bankruptcy Code, 11 U.S.C. 506, and Wisconsin Statute section 846.13. It held that the term "judgment", as used in Wisconsin Statute section 846.13, means the amount of the judgment that survives bankruptcy proceedings and held that Lord had properly redeemed by paying the stripped-

down amount.

Hobl petitioned the Wisconsin Supreme Court to review the decision of the Wisconsin Court of Appeals. The Wisconsin Supreme Court granted the petition to review, and on June 5, 1991, unanimously reversed the lower courts. Hobl v. Lord, 162 Wis.2d 226, 470 N.W.2d 265 (1991).

In so doing, the Wisconsin Supreme Court reviewed the case law concerning strip-downs under 11 U.S.C. sec. 506. Specifically, it reviewed In re Dewsnup, 908 F.2d 588 (10th Cir. 1990), cert. granted _____ U.S. _____, 111 S.Ct. 949, (1991); In re Lindsey, 823 F.2d 189 (7th Cir. 1987); Gaglia v. First Federal Savings and Loan, 889 F.2d 1304 (3rd Cir. 1989); Matter of Folendore, 862 F.2d 1537 (11th Cir. 1989); and In re Zobencia, 109 B.R. 814 (Bankr. W.D. Tenn 1990).

After reviewing those cases, the Wisconsin Supreme Court correctly concluded that section 506 of the Bankruptcy Code does not operate to permit a debtor to redeem real estate. As such, the court continued, there is no conflict between the redemption provision of Wisconsin Statute section 846.13 and federal law. The court further found that to allow a redemption at the stripped-down value, given the terms of Wisconsin Statute section 846.13, was contrary to public policy and could devastate this country's banking system.

From this decision of the Wisconsin Supreme Court Lord petitions the United States Supreme Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Review by the United States Supreme Court of the Wisconsin Supreme Court's

decision is not warranted. In federal bankruptcy proceedings property rights are determined by state law except when in conflict with the Bankruptcy Code. Butner v. United States, 440 U.S. 48 (1979). Wisconsin Statute section 846.13 is Wisconsin's mortgage redemption statute. Section 506 of the Bankruptcy Code, 11 U.S.C. section 506, is the subject of much debate in the courts of this country. A vigorous split of authority exists as to whether a Chapter 7 debtor can use section 506 to strip down real estate mortgages. That issue is currently before this court in In re Dewsnup, supra. Every Court of Appeals' decision which has determined this issue, however, both pro and con, has specifically determined that section 506 is not a redemption provision. There is, therefore, no conflict between section

506 of the Bankruptcy Code and Wisconsin Statute section 846.13. As a result, it is inappropriate for this court to grant Lord's petition for a writ of certiorari. 28 U.S.C. section 1257; Sup. Ct.R. 10.1(b)(c).

REASONS FOR DENYING THE WRIT

Lord curries the favor of this court's writ of certiorari by arguing that the Wisconsin Supreme Court has trampled on federal law. At the heart of his arguments are two statutes: section 506 of the Bankruptcy Code, 11 U.S.C. section 506, and section 846.13 of the Wisconsin Statutes. Section 506 of the Bankruptcy Code provides for bifurcation of a creditor's claim into a secured and an unsecured portion. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, n. 3 (1989). In Chapter 7 proceedings, its use (which has been

coined a "strip down") as to real estate mortgages has generated a split of authority among the Circuit Courts of Appeal and among the Bankruptcy Courts. That issue is presently before this court on certiorari from the Tenth Circuit. In re Dewsnup, supra. Wisconsin Statute section 846.13 is Wisconsin's real estate redemption statute. It provides that a mortgagor must pay the entire amount of the foreclosure judgment plus post-judgment interest, costs and taxes to redeem.

At the onset, it is important to note that the issue before this court in Dewsnup is distinct from the issue presented for consideration by Lord in this case. The issue in Dewsnup, simply put, is whether a Chapter 7 debtor may utilize section 506 to strip-down a real estate mortgage. The issue presented

here is whether section 506 is a real estate redemption provision that preempts Wisconsin Statute section 846.13.[3]

The issue Lord would like this court to entertain is one of the relationship between federal bankruptcy law and state property law. This court has explained that relationship most recently in Butner v. United States, supra. Butner considered whether the right to rents collected during the period between the mortgagor's bankruptcy and the foreclosure sale of the mortgaged premises was to be determined by a federal rule of equity or state law. In finding that the state law controlled, Justice Stevens, for a unanimous court,

---

[3] Lord's arguments are, however, prefaced on the assumption that a Chapter 7 debtor can strip-down a real estate mortgage under 11 U.S.C. 506. If this court affirms Dewsnup, supra., his argument fails.

states:

> "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall' merely by the happenstance of bankruptcy."
>
> 440 U.S. at 55. (Citation omitted)
>
> * * *
>
> "What does follow is that the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued."
>
> 440 U.S. at 56.

See also: Stellwagen v. Clum, 245 U.S. 605 (1918); Sturges v. Crowninshield, 4 Wheat. 122 (1819); and Ogden v. Saunders, 12 Wheat. 213 (1827).

This relationship has been echoed in

Johnson v. First National Bank of Montevideo, 719 F.2d 270 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984). In that case, the Eighth Circuit Court of Appeals was confronted with the question of whether a bankruptcy court had the authority to toll the running of the Minnesota statutory redemption period. In holding that a bankruptcy court does not have this power, the Eighth Circuit states:

> "Article 1, Section 8 of the United States Constitution provides that Congress shall have the power to establish uniform bankruptcy laws throughout the United States. Where Congress has chosen to exercise its authority, contrary provisions of state law must accordingly give way. It is equally well settled, however, that state laws are suspended only to the extent of actual conflict with the bankruptcy system provided by Congress, so that in the absence of any conflict between the state and bankruptcy laws, the law of the state where the property is situated governs questions of property rights."

719 F.2d at 273 (Citations omitted)

* * *

"* * * From the fundamental principles embraced by the Butner opinion, however, . . . it follows that, absent a specific grant of authority from Congress or exceptional circumstances, a bankruptcy court may not exercise its equitable powers to create substantive rights which do not exist under state law."

719 F.2d at 274 (Citations omitted)

Another case dealing with state redemption rights and the rationale of Butner v. United States, supra., is Justice v. Valley National Bank, 849 F.2d 1078 (8th Cir. 1988). In Justice, the debtors filed a Chapter 12 bankruptcy petition following a foreclosure sale but before the expiration of the South Dakota statutory redemption period. In their Chapter 12 plan the debtors proposed to pay the redemption amount over time, which would have the effect of extending the state statutory redemption period.

The debtors argued that under sections 1222(b)(3) and (5) of the Bankruptcy Code, 11 U.S.C. sec. 1222(b)(3),(5), they should be allowed to cure or waive any default, and in their minds, this would include "curing" their state redemption rights by paying the redemption amount over time. In denying the debtors' request, the court held that section 1222(b)(3) and (5) of the Bankruptcy Code did not conflict with the state law on redemption, and held that the state law controlled the rights of the parties regarding redemption. Its comments are noteworthy:

> "Finally, substantial state interests support the application of local law in this context. In addition to the general values promoted by uniform intrastate treatment of property interests, . . . each state has its own well-developed system of real property law, which 'reflect[s] important and carefully evolved state arrangements designed to serve multiple purposes . . .' These systems have no

> federal counterpart, and we are therefore reluctant to 'invent one and impose it upon the states . . .' Lenders and borrowers depend on local property law 'to provide the stability essential for reliable evaluation of the risks involved' in mortgage transactions . . . Absent a clear congressional directive, we should not create new rules and generate additional uncertainties whose ultimate consequences may be difficult to foresee."
>
> 849 F.2d at 1088 (Citations and footnote omitted)

The relationship of state redemption law and federal bankruptcy law was also faced in DeMers v. Federal Land Bank of Omaha, 89 B.R. 48 (C.D.S.D. 1987). The Chapter 11 debtors in that case sought to redeem their foreclosed real estate by paying the redemption amount over time. The only problem was that the South Dakota redemption statute provided for paying the redemption price in one lump sum. The court, following the wisdom of Butner v. United States, supra., held that the debtors could not redeem the

property by paying the redemption amount over time. It respected the state law on redemption requiring a lump-sum payment.

The respect given by the bankruptcy courts to state property law oftentimes results in a bankruptcy court in one state ruling differently on an issue than a bankruptcy court in another state. This court recognizes that reality:

> "Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all the States."

Stellwagen v. Clum, supra. at 613.

A classic example of this is the issue of whether a Chapter 13 debtor can cure a

default and reinstate a home mortgage where the Chapter 13 petition is filed during the state redemption period but after foreclosure and sale. Matter of Roach, 824 F.2d 1370 (3rd Cir. 1987) respecting New Jersey foreclosure law says "no", while In re Clark, 738 F.2d 869 (7th Cir. 1984) respecting Wisconsin foreclosure law says "yes".

With this background, the question in this case becomes whether there is any federal interest that needs protection by the United States Supreme Court. Put more succinctly, whether there is any conflict between the provisions of section 506 of the Bankruptcy Code and Wisconsin Statute section 846.13. As the Wisconsin Supreme Court in this case has noted, there is no such conflict.

As mentioned above, the issue of whether a Chapter 7 debtor can utilize

section 506 to strip-down a real estate mortgage has sharply divided the bankruptcy courts around the country. The circuit courts that have decided the strip-down issue, however, both pro and con, are unanimous in declaring that section 506 is not a redemption provision.

Gaglia v. First Federal Savings & Loan, supra., which holds that a debtor can strip-down a real estate mortgage, states:

> "Section 506, however, is not a redemption provision. Even after lien avoidance, the [debtors] will not own the property unencumbered. They will still be subject to [the first mortgagee's] mortgage and the [second mortgagee's] claim to the extent it is secured. If the [debtors] are delinquent on the first mortgage, [the first mortgagee] has the right to foreclose, even if they can satisfy the [second mortgagee's] secured claim against the remaining equity."

889 F.2d at 1310 (Emphasis added)

Matter of Folendore, supra., which

also allows a real estate mortgage strip-down, states:

> "<u>Section 506(d) does not really 'redeem' the property of the debtor.</u> The [debtors'] only interest in the property is possession--the two [senior mortgagees] effectively own the property. While it is true that the [debtors] might in the future pay off the mortgages on the property, at this moment the [senior mortgagees] could foreclose on the property and cut the [junior mortgagee] and the [debtors] out completely."

862 F.2d at 1540 (Emphasis added)

<u>In re Lindsey</u>, <u>supra</u>., which can be (and has been) read to allow a strip-down of a real estate mortgage, states:

> ". . . [B]ut once the strip-downs were complete and the secured claims allowed in their stripped-down amount . . . the only thing that remained to do in the bankruptcy proceeding was to discharge the debtors and let the creditors foreclose their stripped-down liens, <u>subject to whatever rights of redemption the debtors might have, under state law, in the foreclosure proceedings</u>."

823 F.2d at 191 (Emphasis added)

<u>In re Dewsnup</u>, <u>supra</u>., now before

this court, rejects the notion that section 506 can be used to strip-down a real estate mortgage. The Tenth Circuit, in so doing, notes that the Bankruptcy Code's only redemption provision available to a Chapter 7 debtor is 11 U.S.C. 722, which only applies to personal property. With this in mind, the court states that "it is obvious that Congress did not intend to permit a debtor to redeem his real property through the use of section 506(d)." 908 F.2d at 592 quoting In re Maitland, 61 B.R. 130, 135 (Bankr. E.D. Va. 1986). Dewsnup also notes that its holding does not alter the available remedies which the debtors may have. Id., n. 3.

In addition to the Circuit Court of Appeals, a number of bankruptcy courts that have allowed strip-downs take pains to proclaim that section 506 is not a

redemption provision. In re Zlogar, 101 B.R. 1 (Bankr. N.D. Ill. 1989) states:

> "Section 506 only determines the status of the secured claim and does not determine the rights of a debtor and its creditors with respect to any disposition of the property. Therefore, where a debtor wants to retain ownership of property in a chapter 7 case, application of section 506 is but one step in what will be at least a two-step process. This first step is limited to determining the status of secured claims and what liens remain on the property. The manner of enforcement of those liens remaining after section 506(d) has been applied is a separate question, and a second step, which turns on applicable state law."
>
> 101 B.R. at 8.
>
> * * *
>
> "In light of Lindsey, allowing the Debtor to avoid the liens on her interest in the property to the extent that the liens exceed the value of that property does not necessarily work a redemption. Whether or not the Debtor can redeem or otherwise retain her interest in the property depends on state law applicable to the agreement between the Debtor and whoever emerges as a secured creditor after the section 506(d) hearing."

101 B.R. at 10 (Citation omitted)

Lord cites In re Zobencia, 109 B.R. 814 (Bankr. W.D. Tenn. 1990) but fails to relate that Zobencia recognizes that section 506 of the Bankruptcy Code is not a redemption provision. Zobencia states:

> "The Court recognizes that there is no Bankruptcy Code authorization for redemption of realty. Compare section 722 (permitting redemption at the 'amount of the allowed secured claim' on personal property only). Section 506 is not a redemption statute. . . . The strip down provisions of section 506 merely put the parties in the same position they would be in the event of liquidation, leaving these creditors with no more or less expectation for recovery than they would enjoy at foreclosure."

109 B.R. at 821 (Citations omitted)

Zobencia went on, however, to allow the debtors to pay off the first mortgage and to pay the stripped-down amount to the second mortgagor within 30 days. The court made such an order by reasoning it would merely put the parties in the same

position as they would be under Tennessee law on redemption. If the debtors did not pay within this time period, the mortgagees were permitted to foreclose their mortgages without further court order.

At first blush, the Zobencia holding is confusing. After all, it states that section 506 of the Bankruptcy Code is not a redemption statute but then allows the debtors to pay the stripped-down amount to get the property back. Upon close examination, however, it is consistent. Zobencia states that it is allowing the debtors to make this payment because it puts the parties in the same position they would be under Tennessee's redemption law. Under Tennessee law, a mortgagor can redeem after sale by paying to the purchaser the amount bid at the sale (plus interest and costs).

Tennessee Code Annotated 66-8-101 <u>et. seq</u>. As such, <u>Zobencia</u> allowed the debtors to pay the stripped-down amount as a matter of practicality.

Another case which recognizes the non-redemptive features of section 506 of the Bankruptcy Code and its lack of impact on state law is <u>In re O'Leary</u>, 75 B.R. 881 (Bankr. D. Ore. 1987). There the court allowed a strip down, but stated:

> "Here, allowing the plaintiffs to void the defendant's mortgage on their residence to the extent that the claim secured by the mortgage is unsecured does not necessarily work a redemption. '. . . in a Chapter 7 liquidation proceeding the Court has no authority to rewrite the terms and conditions of the security agreement.' . . . Whether or not the plaintiffs could 'redeem' their residence from defendant's mortgage by payment, to defendant, in the sum of $29,000, might well depend upon the provisions of the note and mortgage existing between plaintiffs and defendant (for example, there could be pre-payment penalties and other contractual obligations that would remain unaltered by fixing

defendant's allowed secured claim under section 506.)"

75 B.R. 884 (Citation omitted)

If judicial construction of section 506 of the Bankruptcy Code cannot rewrite the contract between the parties, it obviously cannot rewrite state redemption laws.

As is clear from the above, section 506 of the Bankruptcy Code is not a redemption provision.

What Lord asks this court to do is to basically invent a redemption provision for real estate in the Bankruptcy Code and then declare that this heretofore unknown redemption provision preempts Wisconsin Statute section 846.13. Such a request is not unlike the scenario faced by this court in Auto Workers v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966). There the plaintiff brought an action under

section 301 of the Labor Management Relations Act, 29 U.S.C. 183, for unpaid vacation pay. The lower courts dismissed the action as untimely under the applicable state statute of limitations. The Labor Management Relations Act contained no limitations provision for such an action. The plaintiff urged this court to adopt a uniform federal statute of limitations in light of Congress' silence in that regard. In refusing that request, this court stated:

> "That Congress did not provide a uniform limitations provision for section 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings, 61 Stat. 146, 29 U.S.C. section 160(b) (1964 ed.), and it did so only after appreciable controversy. In this context, and against the background of the relationship between Congress and the courts on the question of

> limitation provisions, it cannot be fairly inferred that when Congress left section 301 without a uniform time limitation, it did so in the expectation that the courts would invent one."

383 U.S. at 703 (Footnote omitted)

The "context of the legislative omission" is just as strong here as in <u>Auto Workers</u>. Congress has specifically created a redemption provision for personalty in Chapter 7 cases, 11 U.S.C. 722, and is silent as to a redemption provision for real estate. That silence cannot be used to infer that Congress left a real estate redemption provision up to the courts to create. To the contrary, Congress' silence indicates that redemption of real estate is to be governed by the applicable state law.

With no federal real estate redemption provision, there is no conflict between federal law and Wisconsin Statute section 846.13. It

follows then, under the teaching of Butner v. United States, supra that Wisconsin's redemption law is to be followed as there is no federal interest to protect. It also follows that this case is not appropriate for certiorari.[4]

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[4] In his petition for writ of certiorari, Lord, in addition to arguing that section 506 of the Bankruptcy Code preempts Wisconsin's redemption statute, plays the hand of "fairness" and "fresh start." Lord basically argues that it is unfair that he has to pay the judgment amount to redeem the mortgaged premises while Hobl can purchase the mortgaged premises for the amount of his bid. How such an argument is pertinent to whether or not this court entertains this case escapes respondent's perception. The argument ignores the fact that under Wisconsin Statute section 846.10(2) any party, including Lord, may bid at a sheriff's sale. Lord attended the sheriff's sale but, on the instructions on his attorney, did not bid. If he wanted to retain the mortgaged premises, his avenue to do so was the bidding process. This bidding process also preserves his "fresh start."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 28, 1991

APPENDIX

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

In re: Case Number:

DONALD LORD, EU7-89-00332

Debtor.

DONALD LORD,

Plaintiff, Adversary Number:

v. 89-0062-7

FARM CREDIT BANK OF ST. PAUL, a/k/a Federal Land Bank of St. Paul; and ESTATE OF IDA LORD,

ORDER

Defendants.

Defendant Farm Credit Bank of St. Paul having previously moved to dismiss this adversary proceeding, and the motion having been held open at request of the parties pending resolution of related

state court litigation now apparently completed, and any remaining issues herein appearing moot,

NOW, THEREFORE, IT IS ORDERED that the motion of defendant Farm Credit Bank of St. Paul to dismiss is granted, and this adversary proceeding is hereby dismissed.

Dated: July 23, 1991.

BY THE COURT:

HON. THOMAS S. UTSCHIG
U.S. Bankruptcy Judge